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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL., PETITIONERS,

vs.

SUN OIL COMPANY, ET AL.

No. 496

SUN OIL COMPANY, ET AL., PETITIONERS,

vs.

G. E. BURFORD, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR CERTIORARI FILED OCTOBER 27, 1942.

CERTIORARI GRANTED { **DECEMBER 14, 1942.**
JANUARY 18, 1943.

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CAPTION.

BE IT REMEMBERED, that at a regular term of the United States District Court in and for the Western District of Texas, the Honorable Robert J. McMillan, United States District Judge, presiding, and holding its sessions at Austin, Texas, which said term began on the 27th day of January, A. D. 1941, and continued in session to and included the 7th day of February, A. D. 1941, there came on to be heard and determined, among other causes pending on the docket, the following cause:

No. 28 Civil Action.

SUN OIL COMPANY, a Corporation, and MAGNOLIA PETROLEUM COMPANY, a Corporation,

versus

G. E. BURFORD, THE RAILROAD COMMISSION OF TEXAS, LON A. SMITH, G. A. SADLER AND E. O. THOMPSON, and X Y Z OIL AND GAS COMPANY, a Corporation.

AMENDED ORIGINAL BILL OF COMPLAINT.

In the United States District Court for the Western District of Texas, Austin Division.

Sun Oil Company, Plaintiff,

vs. Civil Action, File No. 28.

G. E. Burford, X. Y. Z. Oil & Gas Company, The Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson, Defendants.

To the Honorable Judge of said Court:

Sun Oil Company, a corporation, herein called plaintiff, files this its Amended Original Bill of Complaint against

G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas and the members thereof, Lon A. Smith, G. A. Sadler and E. O. Thompson in their official capacities, herein called defendants, and for cause of action respectfully shows:

1.

This is a civil suit wherein the matter in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00, and is a suit between a citizen of the State of New Jersey and citizens of the State of Texas and Oklahoma, in that plaintiff is a corporation duly organized and doing business under and by virtue of the laws of the State of New Jersey, and G. E. Burford is a citizen of the State of Texas residing in Dallas County, Texas, and the above named members of the Railroad Commission of Texas are citizens of Texas and reside in Travis County, Texas, and the Railroad Commission of Texas is an official board of the State of Texas, permission to sue which board has been granted by Section 14 of Chapter 76, Acts of the Forty-fourth Legislature of the State of Texas, Regular Session, page 189, as amended by Chapter 15, Acts of the Forty-fifth Legislature of the State of Texas, Regular Session, page 17; and X. Y. Z. Oil & Gas Company is a corporation organized under the laws of Oklahoma, maintaining an office in Dallas County, Texas, whose president and agent for service is G. E. Burford of said county and state; and by reason of such facts and also by reason of the Federal questions herein presented this Court has jurisdiction over this cause.

2.

Plaintiff is engaged in the oil and gas producing business in the State of Texas and has a permit from the State of

Texas authorizing it to conduct such business in said State.

3.

By instrument dated July 31, 1930, duly recorded in Volume 4, page 1 of the Deed Records of Gregg County, Texas, W. L. Fuller and wife, Vannie Fuller, the fee owners of the land hereinafter described, conveyed to J. A. Reynolds an oil, gas and mineral leasehold estate in and to the following described land situated in Gregg County, Texas:

"A part of the D. Sanchez H R Survey, situated about 8 miles NW of Longview, Texas, Beginning at a stake in the South line of the Alexander Survey, being the NW corner of a tract surveyed for J. B. Harley and now owned by Bob Smith;

"Thence West, passing the SE corner of the M. Irwin Survey at 731 vrs. on 751.4 vrs. to a corner in the S. line of the said Irwin Survey;

"Thence South 751.4 vrs. to a stake on the West bank of a branch from which a Maple brs. S 77 E. 7 vrs.;

"Thence E. 751.4 vrs. to a large Sweet Gum in a branch for corner;

"Thence North 751.4 vrs. to the place of beginning, and containing 100 acres of land, more or less."

By instrument dated September 15, 1930, duly recorded in Volume 60, page 115 of the Deed Records of Gregg County, Texas, said J. A. Reynolds assigned said entire leasehold estate to Mamie S. Hammonds.

On December 18, 1930, by an instrument recorded in Volume 67, page 47 of the Deed Records of Gregg County, Texas, O. O. Hammonds and Mamie Hammonds assigned said original leasehold estate to Claude Bell and R. A. Graddy, "In so far as it covers the E fifty (50) acres of the above described land"; and said lease as to said east 50 acres is now operated by Magnolia Petroleum Company.

On February 28, 1931, by instrument recorded in Volume 75, page 86 of the Deed Records of Gregg County, Texas, O. O. Hammonds and Mamie S. Hammonds assigned said original leasehold estate to plaintiff, "In so far as it covers the West fifty (50) acres of the above described tract of land"; and continually since said time plaintiff has owned, and now owns said leasehold estate and has developed same for oil and gas purposes by drilling seven wells thereon, and said lease is in full force and effect, and by virtue thereof owns all the oil and gas and other minerals thereunder, subject to payment of a one-eighth royalty on oil and stipulated royalties on gas and other minerals as specified in its lease.

4.

On November 26, 1919, the Railroad Commission of Texas, pursuant to powers granted it by the oil and gas conservation laws of the State of Texas, and for the purpose of conserving such oil and gas, adopted and promulgated what is known as Rule 37 governing the spacing of oil and gas wells in the State of Texas, providing that no oil or gas well shall thereafter be drilled less than 150 feet from a property or division line nor less than 300 feet from any drilling or completed oil or gas well on the same or adjacent tract or farm, and providing for granting of exceptions to said rule by said Commission, after notice to adjacent lessees, where necessary to pro-

tect vested rights or prevent waste of oil and gas. Said Commission could grant exceptions to said rule only on the grounds therein provided, and said rule was valid and binding, applied to the area now known as the East Texas Oil Field of which the lands herein described are a part, and after its adoption continuously remained in effect in said area, except in so far as same was amended and superceded by special well spacing rules adopted by said Commission for special application in said field. On September 2, 1931, after expressly finding that the spacing of wells in said field under the terms of its Rule 37 threatens to cause actual physical waste due to the too rapid dissipation of gas energy in the production of oil and also due to the too rapid encroachment of water in said field and in the interest of preventing actual physical waste of oil and gas therein it is desirable to modify Rule 37 as applied to said field and further expressly finding that such amendment is reasonably necessary and will prevent or greatly minimize such waste therein, said Commission adopted its first special spacing rule applicable to said East Texas field, providing no well should thereafter be drilled for oil or gas in said field at any point less than 660 feet from any drilling or completed well or less than 330 feet from any property or division line, and providing for exceptions in the same manner and under the same terms as is provided in said statewide Rule 37. By special orders dated September 10, 1931, February 25, 1932, April 30, 1932, June 30, 1932, January 31, 1933, June 13, 1933, and October 17, 1933, said Commission, on expressly finding such provisions necessary to prevent physical waste of oil and gas in said field, (the order of February 25, 1932, further finding that the reservoir energy of said field has been dissipated at an excessive rate due to excessive and disproportionate withdrawals of oil therefrom) further amended said statewide rule in so far as it applied to said field, and each

of said special amendments provided that no well should hereafter be drilled in said East Texas Field nearer than point less than 660 feet from any other drilling or completed well or at any point less than 330 feet from any property or division line, and provided for special exceptions in the same manner and on the same terms as is provided in the above described statewide Rule 37 after notice and hearing. From November 26, 1919, to February 25, 1932, said statewide rule or one of said special field amendments issued prior to the last mentioned date was in effect, constituting a continuous regulation of spacing and drilling of oil and gas wells in said field, and since February 25, 1932, there has been in effect continuously, up to May 29, 1934, one of said successive special spacing rules applicable to said field requiring wells to be spaced not less than 330 feet from any property or division line and not less than 660 feet from any drilling or completed wells.

On May 29, 1934, effective as of that date, Rule 37 was further amended by the Railroad Commission as applicable to the East Texas Field so as to read as follows, to-wit:

"Rule 1. Spacing Rule. No well for oil or gas shall hereafter be drilled in said East Texas Field nearer than 660 feet to any other completed or drilling well on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line, or subdivision line; provided that the Commission in order to present waste, or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired application therefor shall be filed with the Com-

mission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equalling four hundred feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling, and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten days notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect the property belonging to applicant from confiscation. All pending applications shall be amended to conform to this rule before being acted upon.

"No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule, and no well drilled under such a special permit which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas; and any such well so drilled in violation of said rule or in violation of a permit granted as a special exception to said rule shall be plugged.

"The order entered by this Commission on August 30, 1933, commonly designated as the direct and equidistant offset order is hereby rescinded, annulled and shall be of no further force and effect. All other rules, regulations

and orders of this Commission which conflict with the terms and provisions of Rule No. 1 as hereby amended and promulgated are hereby declared to have no further application to wells in said East Texas Field to the extent of such conflict.

"In the adoption and promulgation of this order it is here declared that the Commission intends to adopt each phrase, sentence and paragraph, separately and independently of each other such phrase, sentence and paragraph, and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion."

Said order remained in effect continuousiy until after the filing of Plaintiff's Original Complaint herein on July 20, 1939, and all provisions thereof are still in effect, except that on or about July 24, 1939, said Commission added a provision that the Commission on its own motion may call a hearing to determine whether exceptions shall be granted to said rule for either of the purposes therein named.

In connection with said amendment dated May 29, 1934, and supplementing same, the Railroad Commission on said date entered an order applicable to the East Texas Field, reading as follows:

"It Is Ordered by the Railroad Commission of Texas that in applying Rule 37 (Spacing Rule) of statewide application and in applying every special rule with relation to spacing in every field in this State no sub-division of property made subsequent to the adoption of the original spacing rule will be considered in determining whether or not any property is being confiscated within the terms of such spacing rule, and no sub-division of

property will be regarded in applying such spacing rule or in determining the matter of confiscation if such subdivision took place subsequent to the promulgation and adoption of the original spacing rule."

Said supplemental order dated May 29, 1934, has remained in effect continuously since the date of its adoption and is now in effect.

Each of said special amendments applicable to said field were and are valid and binding regulations and all were adopted by said Commission pursuant to the oil and gas conservation laws of the State of Texas, for the purpose of preventing waste of oil and gas in said field.

Under said amended rule the Railroad Commission has the right to grant exceptions thereto only where necessary for the purpose of preventing confiscation of property by drainage of oil therefrom through wells on adjoining tracts, provided the particular property on which it is proposed to drill a well in exception to said rule has not been subdivided from other properties or created into a separate tract from adjoining properties for development purposes since November 26, 1919.

Under the law of the State of Texas, the creation of a strip or tract of land too narrow to be drilled in compliance with said spacing rules, arising by assignment or subdivision of portions of an original leasehold estate in land, does not create a right to an exception to either of the above mentioned spacing rules, and does not create a "vested right" nor a necessity to drill in order to prevent "confiscation of property" within the meaning of said terms as used in aforesaid rules.

5.

On or about June 18, 1938, G. E. Burford filed with the Railroad Commission of Texas an application for permit to drill four wells, in exception to the spacing rules of said Commission hereinabove mentioned, on a strip of land located midway between the east and west lines of said Fuller 100 acre tract and extending from the north to the south lines thereof, being described in said application as 45.8 feet wide at the south end and 49.8 feet wide at the north end and 2127 feet long north and south and containing 2.33 acres, claiming that by actual measurement between its four corners there is contained in said Fuller tract as originally leased 102.33 acres of land. After due notice and hearing at which plaintiff contested said application, Defendant Commission, by order dated September 21, 1938, denied said application as to all four locations in Cause No. 26,868 on the Rule 37 Docket, Oil and Gas Division of said Commission.

On January 9, 1939, Defendant Burford filed with said Commission a new application for permit to drill four wells on said 2.33 acres, at substantially the same locations, and on January 10, 1939, said Commission granted a rehearing on said application, and after due notice a hearing was held on said new application on January 31, 1939, plaintiff again contesting same, and by its order dated March 25, 1939, in the above mentioned case number said Commission granted permit to Defendant Burford to drill well location No. 2 on said strip, and denied permit for well locations Nos. 1, 3 and 4, thereon, and a copy of said order is attached hereto as Exhibit "A" and made a part hereof as if copied herein.

On April 5, 1939, Defendant Burford filed with said Commission a petition for rehearing on his locations Nos. 1, 3 and 4, which rehearing said Commission granted by

its order dated April 29, 1939. On April 6, 1939, plaintiff filed with said Commission its petition for rehearing on Burford's No. 2 location and a rehearing thereon was likewise granted by said Commission by its order dated April 29, 1939.

Thereafter said Commission issued notice of rehearing to be held May 19, 1939, on the application of G. E. Burford for special permit to drill wells Nos. 1 to 4, inclusive, on said 2.33 acres of land, at the same locations described in his application filed January 9, 1939, and plaintiff again contested said application at said rehearing, and by its order dated June 2, 1939, said Commission granted Defendant Burford a special permit to drill each of the four locations applied for by him, said locations being as follows:

#1—330 feet S of the N. line; midway between E. and W. lines.

#2—489 ft. S. of location #1; midway between E. and W. lines.

#3—489 ft. S. of location #2; midway between E. and W. lines.

#4—330 ft. N. of S. line; midway between E. and W. lines.

A copy of said order is attached hereto as Exhibit "B" and made a part hereof as if copied herein.

Thereafter, within the time prescribed by an order of said Commission for the filing of motions for rehearing, plaintiff filed with said Commission on June 2, 1939, its petition praying that a rehearing be granted and that after further hearing the above mentioned orders granting

Defendant Burford a special permit be canceled, and in the alternative that the allowable production for said four locations be so adjusted, and the permit for drilling and operating same be so conditioned, that the total allowable production from said 2.33 acre strip on each producing day shall not exceed 2.33 100 of the total allowable production of the remaining and adjoining 100 acres of the W. L. Fuller tract as fixed by said Commission for each day, and said Railroad Commission denied said petition by its order dated July 10, 1939, without further hearing, and without granting any of the relief therein prayed for.

6.

At the hearings held on said application it was proved and plaintiff shows as a fact that in Cause No. 54,769 plaintiff and Magnolia Petroleum Company were awarded a final judgment by the District Court of Travis County, Texas, against the Railroad Commission of Texas, the members thereof, and Mamie S. Hammonds, O. O. Hammonds and T. S. Schroeder, cancelling permit issued by the Railroad Commission of Texas to Mamie S. Hammonds by order dated October 11, 1934, permitting the drilling of an oil and gas well on the same strip covered by Burford's application at a point 412 feet from the north line and midway between east and west lines of said strip; that it was in issue in said case that said well was not necessary to be drilled and operated either for the purpose of preventing waste of oil and gas or for the purpose of protecting vested rights of the owner of the leasehold estate in said strip, and that by reason of the subdivision the strip was not entitled to be developed as a separate tract under the field spacing rule, and said issues were necessarily adjudicated in said judgment; that since the entry of said judgment G. E. Burford claims to have acquired by assignment through Mamie S. Hammonds, O. O Hammonds and T. S. Schroeder the oil and gas

leasehold estate in said strip, and they are the source of such title as he has. By reason of said judgment the Railroad Commission had no jurisdiction or authority to grant a permit for the drilling of each or either of the locations applied for by Defendant Burford in that there existed at the time of the hearings on Burford's application no such change of conditions occurring since said judgment as would entitle said strip to a permit for each or either of said locations. Plaintiff shows that no additional wells have been drilled since the date of said judgment offsetting the northern part of said strip on which is situated the well location for which permit was canceled by said judgment; that Burford's No. 1 location is only 82 feet from the location for which permit was canceled by said judgment; that the existing reservoir conditions under said strip are the same and bear the same relation to reservoir conditions in the field generally as at the date of said judgment and date of permit thereby canceled; that each of the Burford locations is no more necessary as an exception to the spacing rule in said field than the location for which permit was canceled in said judgment, and the drilling of wells on said strip was no more necessary to prevent waste of oil and gas at the dates of the several hearings on Burford's application than at the date of said judgment or at the date of said prior permit.

7.

At the hearings on said Burford application it was proved, and plaintiff now shows, that there was then pending in the District Court of Travis County Cause No. 53,915, styled Sun Oil Company vs. Railroad Commission, et al., in which suit there was in issue the authority of the Railroad Commission of Texas to grant a permit in exception to the field spacing rule permitting the drilling of a well for oil or gas at the identical location as Burford's location No. 1, and in said suit the

issue was raised that said location is not necessary under either ground of exception to said rule, and that because of its size and the fact of subdivision it is not entitled to be developed as a separate tract under said rule; said suit being in the nature of an appeal from an order of the Railroad Commission of Texas dated February 1, 1934, granting Mamie S. Hammonds special permit to drill said well location in exception to the field spacing rule. Because of the pendency of said suit said Railroad Commission had no jurisdiction to grant Defendant Burford a permit to drill his well location No. 1, or any other location on this land, and its orders granting Defendant Burford's application for permit are illegal and void.

8

None of the members of the Railroad Commission were present at the hearings on said Burford's applications, same being conducted before an examiner, who then made his report to said Commission in the form of a memorandum after each hearing; and in acting on said applications said Commission had before it said examiner's memorandum, but not all the evidence heard and offered at the hearings. Said Commission employs an informal procedure in disposing of applications of this character, and objections made by plaintiff to admissibility of evidence offered by applicant at said hearings were not ruled upon by the examiner, and were not presented by said examiner's memorandum to said Commission for a ruling, nor were such questions ruled on by said Commission, but the case was presented by the examiner to said Commission as if all testimony adduced were legally admissible and received without objection. Said memoranda did not correctly or sufficiently state all the evidence offered by plaintiff, and the memorandum of the hearing held May 19, 1939, erroneously states plaintiff's witness testified the drilling of these four locations will

bring about a more uniform spacing of wells on the entire Fuller 100 acres, fails to state that said witness testified the entire Fuller tract was protected from drainage by wells on other tracts, and fails to state the reasons and facts testified to by said witness in support of such statement. The examiner's memoranda of hearings were not available to plaintiff for correction, amplification or exception before being submitted to said Commission, and said Commission has established no procedure for correction of an erroneous memorandum, or for the taking of exceptions to same, and has no rules or procedure allowing the filing of bills of exception or providing for consideration thereof. By reason of such procedure plaintiff has been denied a full and proper hearing by said Commission, and will be deprived thereby of its property without due process of law guaranteed it by the Fourteenth Amendment to the Constitution of the United States; and plaintiff expressly urged in its petition filed with said Commission on June 22, 1939, that a rehearing should be granted it for such reasons.

9.

At the first two hearings Burford offered in support of his application testimony by a petroleum engineer to the effect that the field spacing rule implies that a well will not effectively drain farther than 330 feet from the well, that there are four areas approximately in the center, east and west, of the Fuller 100 acre tract which are more than 330 feet from any adjacent well and which under the alleged implication of said spacing rule were not being efficiently drained, in the opinion of applicant's witness; that said areas would be within 330 feet of the four Burford locations, and the drilling of said four locations, in the witness' opinion, was therefore necessary to prevent waste of oil and gas within the meaning of said rule as interpreted by said witness. Said testimony was ob-

jected to by protestants at said hearings on the ground that said spacing rule contains no such implication in that where wells are evenly spaced at the minimum distances of 660 feet apart provided in said rule there will be areas 466 feet distant from the nearest well, and therefore the adoption of said rule by said Commission in order to prevent waste implies a finding by said Commission that a well will efficiently drain in said field a minimum distance of 466 feet. Burford's said witness also testified at said hearings that in his opinion the closer wells are drilled to each other (irrespective of whether they are the distance required in the spacing rule) the more oil will be recovered from the field, and that therefore, in his opinion, each of the four Burford locations would increase recovery from the field and thus prevent waste. It was undisputed that each of said locations is less than 660 feet from adjacent wells, and in fact only one of said Burford locations is as much as 450 feet from adjacent wells, and the remainder are at closer distances. Said last mentioned opinion testimony was objected to by plaintiff at said hearings on the ground that it is merely a collateral attack upon the wisdom of the field spacing rule which cannot be legitimate evidence of a necessity for an exception in this proceeding under said rule to procure permit. The examiner's memorandum stated applicant's contention that the wells are necessary to drain the area effectively, but neither of said objections to such testimony was presented by the examiner's memorandum to said Commission for a ruling, and said Commission made no order or ruling on said objections. Said testimony so objected to was inadmissible and does not constitute substantial evidence that the drilling of said Burford locations, or either of them, is necessary to prevent waste within the meaning of said field rule, and because of the admission of such improper evidence the orders of said Commission granting Burford permit to drill should not be sustained by this Court on any pre-

sumption that said Commission found or was entitled to find the wells necessary to prevent waste. Said Commission did not make the file separate findings of fact in connection with said Burford application, and the only finding made by said Commission is the finding contained in its orders attached hereto as Exhibits "A" and "B", to the effect that said four locations are necessary to prevent "confiscation of property". Plaintiff further shows said orders granting permit are not sustainable on the ground of necessity to prevent waste because plaintiff offered testimony by petroleum engineers at said hearings showing such wells are not necessary for such purpose, because said Commission did not find them necessary nor grant same on the ground they are necessary to prevent waste, and because said Commission is legally required to pass on the facts in the first instance, and to uphold said permit on the ground that there was some substantial evidence before said Commission exclusive of the inadmissible evidence received by it that said Burford locations, or either of them, are necessary to prevent waste would permit a taking of plaintiff's property, as hereinafter detailed, without compensation and without either an administrative or judicial determination of the facts on said issue, denying plaintiff due process of law guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

10.

At said hearings there was no evidence, and no substantial evidence that the drilling of said four locations is necessary to enable Burford to produce an amount of oil equal to the amount of recoverable oil under said 2.33 acre strip, or negativing undisputed testimony offered at said hearings that one well on said strip under the proration orders of the Railroad Commission will produce oil approximately three times as fast in proportion to its

underlying reserves as the adjacent portions of the Fuller tract, and will ultimately produce in excess of the equivalent of the recoverable oil under the strip and four wells would give said strip an undue advantage in drainage opportunity over such adjacent portions; or that, disregarding the subdivision of said 2.33 acre strip from plaintiff's Fuller 50 acre lease, the entire area of 52.33 acres needed permit for four additional wells, or that the four locations granted would be the proper locations to be granted on said 52.33 acres if the latter needed any additional wells under either ground of exception to the field spacing rule. It was undisputed that said four Burford locations were each situated approximately 24 feet from the east line of said 52.33 acres, being the east line of the strip claimed by Burford, and the same distance from the west line of said strip; that there are three wells offsetting said 52.33 acres to the east, each located approximately 330 feet distant; that there are three wells on plaintiff's lease offsetting the west line of said strip, each located approximately 330 feet therefrom; that there are a total of seven wells on plaintiff's lease and a total of six wells on Magnolia Petroleum Company's lease on the east 50 acres of the Fuller 100 acre tract; that the west 52.33 acres of said Fuller tract is more densely drilled, and under the Commission's proration order is allowed to produce more oil per acre per day than said Magnolia Petroleum Company's 50 acre lease. There was no testimony showing or tending to show that any additional wells are necessary to be drilled on the west 52.33 acres of the Fuller tract in order reasonably to protect same from drainage by wells on the east 50 acres of said tract, or showing that said west 52.33 acres at the time of said hearings was not reasonably protected by its existing wells from drainage by wells on the east 50 acres of said Fuller tract. Likewise, there was no testimony at said hearings that the drilling of said four Burford locations, or either of them, is necessary to protect said 52.33 acres from drainage by

wells on any other tract adjacent thereto, or that wells on any such other tracts were at such times draining oil from said 52.33 acres. Said Burford locations were applied for and granted as Wells Nos. 1, 2, 3 and 4 on 2.33 acres, not as the eighth through the eleventh wells on said 52.33 acres, and said permits are not sustainable on the latter theory, the Railroad Commission having made no such finding.

In its motion for rehearing dated June 22, 1939, plaintiff offered to pool its 50 acre lease with said strip, so that the owner of the leasehold estate in said strip would receive, without drilling any wells on the strip, a ratable share in the future production from the pooled property in proportion to the acreage contributed by him, less deduction in the same proportion for future drilling and operating expenses occurring after the pooling is consummated; and plaintiff here now repeats and again tenders said offer in open Court, so that no inequity will result from cancellation of the permits herein attacked.

It was admitted by applicant's witness at said hearings that the drilling of Burford's four locations on the 2.33 acres as applied for and subsequently granted would make necessary the drilling of approximately sixteen equidistant offset wells, and would bring about the drilling of a total of 17 wells on an area three times the width and 660 feet longer than said strip (extending 330 feet farther north and 330 feet farther south, a total area of approximaterly 10 acres); and it was undisputed that this would bring about a grouping of wells at closer distances than is provided in the field rules, an uneven spacing of wells in said area and that such condition under the Commission's proration order will cause uneven withdrawal of oil and tends to cause the creation of a low pressure area; and such conditions cause less recovery of oil and gas than even spacing of wells and even withdrawal of oil.

11.

Said orders granting Defendant Burford permit to drill and operate said locations was in violation of the conservation laws of Texas and the aforementioned valid rules and regulations of the Railroad Commission, and of the right of plaintiff herein, and should be annulled by judgment of this Court, having been arbitrarily entered by said Commission, there being no evidence, and no substantial evidence, introduced at the aforesaid hearings supporting the orders of said Commission granting said well locations, or either of them; and in that such orders permit Defendant Burford and X. Y. Z. Oil & Gas Company as his grantee, by drilling and operating said well locations, to take, drain and confiscate plaintiff's oil, as herein more fully shown, they deny plaintiff due process of law and equal protection of the law as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

12.

Each of said orders granting Defendant Burford permit for said four locations is unreasonable, discriminatory and unjust in fact in its operation against plaintiff, and is in violation of the conservation laws and rules of the State of Texas applicable to said land and field, and the constitutional rights of plaintiff, for the reasons set out hereinabove and because:

(a) Under the express provisions of the field spacing rule and under the law of the State of Texas, the 2.33 acres being too narrow to be drilled under said rule, the voluntary subdivision of same from the west 50 acres of the Fuller tract must be disregarded in administering the field spacing rule, and no right exists under said rule to develop said 2.33 acres as a separate tract, and under

the pooling offer made before said Commission and here made, said Burford and his grantee can receive his and its fair share of the production and the equivalent of the amount of recoverable oil in place under said 2.33 acres, without the separate development of said 2.33 acres. Under the conditions existing at the time of said hearings on the Burford application there were sufficient wells on plaintiff's lease to produce the equivalent of the recoverable oil under the west 52.33 acres of the Fuller tract, disregarding the subdivision, without drilling or operating either of said Burford locations. In the alternative, if said west 52.33 acres was not reasonably protected by existing wells from drainage by wells on other tracts, plaintiff shows said Burford locations 24 feet from the east line of said 52.33 acres are not proper or necessary for such purpose, and the granting of same for such purpose would be an abuse of discretion on the part of said Railroad Commission, because there exist other points on said west 52.33 acres, farther from adjacent wells and boundary lines, at which points any further wells necessary to protect the property as a whole could be drilled, which would force the drilling of fewer offset wells in close proximity and which would bring about a more even distribution of wells and more even withdrawal of oil than would result from the drilling and operation of said Burford locations, and which would consequently cause less waste of oil and gas and injury to the property than would result from said Burford locations.

(b) If said Burford locations are drilled and operated on said 2.33 acre tract, it will be necessary for plaintiff to drill four equidistant offsets to said locations in order to lessen drainage of oil and gas by Burford's wells from plaintiff's lease, and it reasonably appears and plaintiff so alleges that a total of 15 or 16 offsets will be required in similarly protecting all the adjacent leases. All of such offsets will be less than the minimum distances from other

wells and property lines required by the field spacing rule, which will cause a great concentration of drilling and more uneven spacing of wells and more uneven withdrawal of oil from the reservoir; that the drilling and operation of said Burford locations alone or in connection with such necessary offsets will cause a further lowering of reservoir pressure in such vicinity, which will cause oil and gas to be forced to such point from surrounding areas of higher pressure at a great sacrifice and loss of energy, and with the lowering of pressure gas wastage will start, and as the gas content is diminished the viscosity of the oil will increase, thereby leaving great quantities of oil in place in the sand which could be recovered except for such close grouping of producing wells, and will increase the fire hazard, and will thereby cause waste.

(c) Under the proration order of said Commission then in effect each of the wells on the Fuller tract was allowed to produce 20 barrels each producing day, by virtue of which plaintiff's 50 acre lease had a total daily allowable of approximately 140 barrels, being an average of, to-wit: 2.8 barrels per acre per day. Under said order each well drilled and operated by Burford or his grantee on said 2.33 acres would have an allowable of, to-wit: 20 barrels each producing day or an average of 8.58 barrels per acre for each well so drilled and operated, being a total of 34.33 barrels per acre per day for said 2.33 acres in the event four wells are drilled and operated thereon. If plaintiff then drilled four additional wells on its lease as offsets to said Burford locations, under the existing proration order said additional wells would each receive an allowable of 20 barrels per producing day, which would give plaintiff's lease an average allowable of 4.4 barrels per acre per day; that under said order Burford's average allowable production per acre per day with four wells would be 7.8 times as great, or 680% greater than plain-

tiff's allowable production per acre per day after it had drilled such offsets; that by reason of such conditions the drilling by plaintiff of offset wells to Burford's well locations would not protect plaintiff's property from drainage but would only lessen to some extent the drainage of oil from plaintiff's lease by Burford's wells, and the drilling and operation of said Burford location will enable Burford and his grantee to drain, produce and confiscate to his and its own use, and benefit large and inestimable quantities of oil and gas from plaintiff's lease. Under the law of the State of Texas plaintiff owns the oil and gas under its lease, but has no legal recourse for the value of oil and gas drained from its property. The granting to Burford of permit to drill and operate the four locations herein complained of causes a discrimination against plaintiff in favor of Burford, which said Railroad Commission had the power and duty to prevent, and being without reasonable basis in fact, in that one well on said strip would give same an advantage in drainage opportunity over all adjoining properties and particularly over plaintiff's property, said order discriminates in favor of said defendant and his grantee and against plaintiff, and denies plaintiff the equal protection of the law and deprives it of its property without due process of law as guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

Since the filing of the Original Complaint herein, said Commission has amended its proration rule for said field, with the effect that the allowable of plaintiff's wells have been increased in amounts varying from 0.53 and 0.69 of a barrel per well for each producing day, and the allowables for wells on the 2.33 acres have also been increased in approximately the same amounts, but the comparative allowables and drainage advantage of one well and all four wells on said strip remain substantially as before.

(b) If there be any reasonable basis for granting Burford permit for four wells or any of them on the ground of properly developing and conserving the oil and gas reserves of the State of Texas, or on any other ground, which plaintiff does not admit but expressly denies, the order granting said permit is nevertheless unjust, unreasonable and discriminatory in fact as to plaintiff and denies it equal protection of the law and deprives it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States because said Railroad Commission had the power and duty coincident with the granting of such permit to adjust the allowable from wells on said 2.33 acres so that the total daily allowable therefrom would not exceed 2.33 100 of the total daily allowable production for the remaining and adjoining 100 acres of the Fuller tract as fixed by said Commission for each producing day, and such provision would enable defendant Burford and his grantee to produce, and only produce, his and its fair share of the oil in place in relation to the remainder of said Fuller tract, the per acre oil content of said 2.33 acres being substantially the same as the average per acre content of the remaining 100 acres of said Fuller tract. Said Railroad Commission has no legal right or authority, under the guise of conserving oil or gas to authorize or enable Defendant Burford to drain large quantities of oil from plaintiff's property when it had a way open to it to prevent such result; that by so adjusting the allowable, the injury to plaintiff from the drilling and operation of said four Burford locations would be materially less, and the orders of said Commission granting said Burford permit without at the same time making proper provision for the protection of plaintiff's property is arbitrary, unreasonable, unjust and discriminatory in fact and authorizes an unlawful taking of plaintiff's property for supposed public benefit, without

compensation to it, in violation of Section 17 of Article I of the Constitution of the State of Texas, and deprives plaintiff of equal protection of the law and takes its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

13.

In connection with the foregoing, plaintiff shows that the oil bearing sand in the East Texas Oil Field, in which the land herein described is situated, is a blanket sand, and said sand is of substantially uniform thickness, porosity, permeability and saturation under said 2.33 acre parcel of land and the surrounding area, including plaintiff's lease, except the sand becomes thicker west of the strip and thinner to the east, the 2.33 acres being underlaid with substantially the same amount of oil per acre as the average per acre content of the neighboring area. Under the producing sand along the westerly edge of the pool and underneath a greater portion of it is a head of salt water pressing laterally and vertically on the reservoir of sand containing oil and gas. The gas tends to expand and the combined water and gas pressure create a force or energy that extends throughout the pool or reservoir. The sand containing the oil and gas is porous. the gas in solution renders the oil less viscous and greatly facilitates its passage through the sands. When wells are drilled from the surface into the producing sand, areas of reduce pressure are created at the bottom of the wells and the gas pressure and water drive—which together form the reservoir energy of the pool—drive the oil and gas to the bottom of the wells and up through the wells to the surface. The oil and gas readily migrate through the sand from areas of higher pressure to areas of lowered pressure at the bottom of the wells, across and without reference to surface property lines.

Under the existing orders of the Railroad Commission at the dates of said permits the production from wells in the East Texas Field was limited according to potential productivity of each well. The allowable production from the well locations complained of and from other wells which will be required thereby was and will be substantially the same as the allowable for wells now producing in this area, under the proration order then existing and under the present order. No allowance was made under the then existing order for the surface area of the land on which a well was located, nor on account of sand thickness, nor for the amount of oil in place under the land of the owner of a well in fixing the allowable production for wells in the field and in determining the amount of oil the owner of a well should fairly be permitted to produce in order to enable him to recover through such well the amount of oil he had in place under his tract of land. Wells in said field and in the area of the Fuller tract are capable of efficiently draining oil and gas for distances in excess of 466 feet from the well bore.

14.

Plaintiff's lease is fully and reasonably developed for oil and gas by the wells situated thereon, but it will be necessary for plaintiff to drill and equip at least one additional well as an offset to each well drilled and operated on said 2.33 acres, at a minimum cost to plaintiff of approximately $10,000.00 for each of said additional wells. The drilling and operation of wells on said 2.33 acres and likewise such offsets thereto as are drilled and operated on the adjoining tracts, including plaintiff's tract, will cause plaintiff's flowing wells to become pumpers sooner than they otherwise would, which will increase the cost of operating same, and will cause waste

of oil and gas under plaintiff's lease, and will reduce the amount of oil plaintiff's wells would otherwise eventually recover from the sand underneath its lease, and the market value of plaintiff's lease will be depreciated thereby in an inestimable amount, and for all the injuries and damages herein alleged, including its loss through drainage to wells on the 2.33 acres which alone will far exceed the sum of $3,000.00, exclusive of interest and costs, plaintiff has nø adequate remedy at law, the exact extent of such damages being difficult, if not impossible, of accurate estimation and are irreparable and therefore plaintiff's only practical and adequate remedy is the injunctive relief herein prayed for.

15.

On April 4, 1939, prior to the commencement of any operations on the well locations on the 2.33 acres, plaintiff advised Burford by prepaid telegram that it would file with the Railroad Commission a motion for rehearing on his No. 2 location granted by the Railroad Commission's order of March 25, 1939. Said motion for rehearing was thereafter filed within the time permitted by rule of the Railroad Commission with respect to such matters. Prior to the determination of such motion plaintiff obtained information that Defendant Burford was moving certain materials on the ground preparatory to drilling said well location No. 2, and plaintiff promptly notified him by prepaid telegram that it would file suit to cancel said order; that said Burford had commenced drilling said location before the Railroad Commission granted plaintiff's motion for rehearing on said No. 2 well; that after said Commission entered its order dated June 2, 1939, granting Defendant Burford permit to drill four wells on said strip, plaintiff notified Burford on June 7, 1939, by prepaid telegram, and before any further opera-

tions were commenced or conducted on said strip, that plaintiff would appeal from said order, and thereafter duly posted in the United States Mail, properly addressed to said Burford at his residence address in Dallas, Texas, on June 22, 1939, a copy of the petition for cancellation of said permits and for alternative relief filed by plaintiff with the Railroad Commission on said date. Without awaiting the action of the Railroad Commission on plaintiff's last mentioned petition Defendant Burford has proceeded and is now proceeding with further operations on said locations; that plaintiff has not been guilty of laches but has acted with promptness and diligence in asserting its right to relief before said Railroad Commission, and after exhausting all opportunity of relief from said Commission has proceeded with due diligence in the filing of this complaint.

16.

X. Y. Z. Oil & Gas Company has acquired G. E. Burford's leasehold estate in the 2.33 acres and has proceeded with operations on, and is now operating, wells on said 2.33 acres under and by virtue of the orders granting permits herein complained of.

Wherefore, all defendants except X. Y. Z. Oil & Gas Company having been summoned, plaintiff prays that process issue requiring defendant X. Y. Z. Oil & Gas Company to appear and answer herein, and that on final hearing said orders of the Railroad Commission dated March 25, 1939, and June 2, 1939, granting Defendant Burford permit to drill well locations Nos. 1, 2, 3 and 4 on said 2.33 acres of the W. L. Fuller, et ux, tract in the D. Sanchez Survey, Gregg County, Texas, be set aside and adjudged wholly null and void, and that judgment be rendered herein denying Defendants Burford and X. Y. Z. Oil & Gas Company authority to drill and operate said locations, or any of them, for oil or gas. Plaintiff

further prays that Defendants Burford and X. Y. Z. Oil & Gas Company, and each of them, their agents, attorneys, employees, representatives and assigns be permanently enjoined from further drilling or attempting to drill each and either of said well locations and from further operating, producing or attempting to produce oil and or gas therefrom, and that the Railroad Commission of Texas be enjoined from authorizing pipe line connections to said wells from and after the date of such injunction. In the alternative plaintiff prays that Defendants Burford and X. Y. Z. Oil & Gas Company, and each of them, their agents, attorneys, employees, representatives and assigns be enjoined from producing oil or gas from said four wells and each of them until such time as the Railroad Commission of Texas shall, after due notice and holding of a hearing, enter an order so adjusting the allowable production of said locations that the total daily production from all wells drilled and operated on said 2.33 acres under said permit orders shall not bear a greater proportion to the total daily allowable fixed by said Commission for the wells on the remainder of the Fuller 100 acres than the oil reserves in place under said 2.33 acres bears to the oil reserves in place under the remainder of the Fuller 100 acre tract.

Plaintiff further prays for costs of suit and such other relief, special or general, as it may be justly entitled to receive.

T. L. FOSTER,
MARTIN A. ROW,

Dallas, Texas.

POWELL, WIRTZ, RAUHUT & GIDEON,
J. A. RAUHUT,
Attorneys for Plaintiff, Sun Oil Company.

Austin, Texas.

29 EXHIBIT "A".

State of Texas.

Railroad Commission of Texas.
Austin.

#1, 2, 3, 4, W. L. Fuller 2.33 acres, Dolores Sanches Survey, Gregg County, Texas.

Case No. 26,868.

Rule 37.

Applicant: G. E. Burford, 4436 Fairfax Avenue, Dallas, Texas.

The application of G. E. Burford for an exception under the provisions of Rule 37 coming on to be heard on the 31st day of January, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception and that same should be granted to prevent confiscation of property:

Now, therefore, it is Ordered that the application of G. E. Burford for an exception under the provisions of Rule 37, and a permit to drill well No. 2, W. L. Fuller lease containing 2.33 acres of land out of the Dolores Sánchez Survey in Gregg County, Texas, as shown by plat submitted is hereby approved and applicant is granted permission to drill well No. 2 to be spaced as follows:

489 feet south of location No. 1, or 819 feet south of the north line; midway between east and west lines of the lease.

It is further Ordered that wells Nos. 1, 3 and 4 are hereby denied.

Entered at Austin, Texas, on this the 25th day of March, 1939.

LON A. SMITH,
Chairman,
ERNEST O. THOMPSON,
Commissioner,
.....,
Commissioner.

Attest:
C. F. PETET,
Secretary.

The above and foregoing is a true and correct copy of an order of the Railroad Commission entered on the above date.

STANFORD PAYNE,
Chief Deputy Supervisor Oil and Gas Division.

30 EXHIBIT "B".

State of Texas.

Railroad Commission of Texas.
Austin.

#1, 2, 3, 4 W. L. Fuller 2.33 acs. D. Sanchez Sur., Gregg Co., Tex.

Case No. 26,869.

Applicant: G. E. Burford, 4436 Fairfax Ave., Dallas, Texas.

The application of G. E. Burford for an exception under the provisions of Rule 37 coming on to be heard on the

19th day of May, 1939, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception, and the same should be granted to prevent confiscation of property:

Now, therefore, it is Ordered that the application of G. E. Burford for an exception under the provisions of Rule 37, and a permit to drill wells =1, 2, 3, 4 W. L. Fuller 2.33 acre lease, D. Sanchez Survey, Gregg County, Texas, as shown by plat submitted, is hereby approved and applicant is granted permission to drill wells 1, 2, 3, 4 to be spaced as follows:

=1—330 feet S. of the N. line; midway between E and W lines.

=2—489 ft. S. of location =1; midway between E & W lines.

=3—489 ft. S of location =2; midway between E & W lines.

=4—330 ft. N of S. line; midway between E & W lines.

Entered at Austin, Texas, on this the 2nd day of June, 1939.

LON A. SMITH,
Chairman.

.....,
Commissioner.

JERRY SADLER,
Commissioner.

Attest:
C. F. PETET,
Secretary.

The above and foregoing is a true and correct copy of an order of the Commission on the above date.

STANFORD PAYNE,
Chief Deputy Supervisor.

Acknowledgment of Service.

The undersigned hereby acknowledge receipt of a copy of "Amended Original Bill of Complaint", by delivery in person, this 11th day of January, 1940.

GERALD C. MANN,
Attorney General of Texas,
JAMES P. HART,
Assistant Attorney General,
By EDGARD CALE,
Assistant Attorney General,
Attorneys for Defendants,
Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. S[illegible]r.
F. L. KUYKENDALL,
Attorney for Defendant, G. E. Burford.
DAN MOODY,
Attorney for Intervener, Magnolia Petroleum Company.

Filed 11th day of January, 1940.

INTERVENER MAGNOLIA PETROLEUM COMPANY'S AMENDED ORIGINAL BILL OF COMPLAINT.

32 (Title Omitted.)

To the Honorable Judge of said Court:

The Magnolia Petroleum Company, a private corporation, hereinafter called Intervener, with permission of the Court, files this its Amended Original Bill of Complaint as an Intervener against G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas and the members thereof, to-wit, Lon A. Smith, G. A. Sadler and E. O. Thompson, in their official capacities, herein called Defendants, and for cause of action respectfully shows:

I.

This is a civil suit arising under the first section of the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00). The Intervener is a private corporation duly organized, existing and doing business under and by virtue of the laws of the State of Texas; G. E. Burford is a citizen of the State of Texas, residing in Dallas County, Texas; and the above named members of the Railroad Commission of Texas are citizens of Texas and reside in Travis County in that State; the Railroad Commission of Texas is an official board of the State of Texas, and permission to sue said board has been granted by Section 14, Chapter 76, Acts of the Forty-fourth Legislature of the State of Texas, Regular Session, page 189, as amended by Chapter 15, Acts of the Forty-fifth Legislature of the State of Texas, Regular Session, page 17; and X. Y. Z. Oil & Gas

Company is a corporation organized under the laws of Oklahoma, maintaining an office in Dallas County, Texas, whose president and agent for service is G. E. Burford of said County and State; that by reason of the facts alleged in Part 1 of the Amended Original Bill of Complaint filed herein by the Sun Oil Company, this Court has jurisdiction of this cause, and by reason of the Federal questions herein presented and of said statute this Court has further jurisdiction of the cause of action presented by this intervention.

II.

Intervener is the owner of the oil and gas leasehold estate and rights in the east 50 acres of the Fuller tract described in Part 3 of said Amended Original Bill of Complaint, under an oil and gas lease in the usual form that gives it the exclusive right to drill wells upon said land for and to produce and sell oil from the said land, and vests in it ownership of seven-eighths of the oil under said land. That Intervener has heretofore fully developed said tract of land for the production of oil and gas therefrom by drilling thereon six wells, and has, since 1931, been and now is producing oil therefrom.

III.

That Intervener is interested in the subject-matter of this cause and in the effort herein made to have canceled and held for naught the permit order of the Railroad Commission of Texas herein involved because the said order authorized wells to be drilled upon an alleged strip of land which adjoins the said land of this Intervener along its entire western edge, and any wells that may be drilled upon said alleged strip of land will drain oil from beneath Intervener's said land, being oil that

belongs to and would otherwise be produced by it, which drainage of oil can be minimized but not entirely prevented by the drilling by Intervener of an offset well, otherwise unnecessary, to each well drill on said strip, at a cost of over Ten Thousand Dollars ($10,000.00) for each well. That the drilling and operation of any well on said strip will further injure Intervener in that the operation thereof either with or without offsets thereto, will cause waste as herein alleged and will also cause earlier reduction in the pressure in the oil producing structure under Intervener's lease to the point where the gas will come out of solution in the oil therein, thus rendering the oil more viscous, and causing it to pass less readily through said structure, and causing the wells of Intervener to become pumping wells sooner than they otherwise would, increasing the expense of production of oil from said land by Intervener, and reducing the market value of its said lease.

IV.

Intervener adopts, with like effect as if herein copied, all allegations of the said Amended Original Bill of Complaint of the Sun Oil Company contained in Parts 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 of such Complaint.

V.

Intervener further shows that it joined the Plaintiff herein in filing the petition for rehearing, as alleged in Parts 5 and 10 of said Amended Original Bill of Complaint.

VI.

In amplification of Part 9 of said Bill of Complaint, Intervener shows that the application and plat filed by De-

fendant Burford with the Railroad Commission, upon which the well permits herein involved were granted, did not contain any statement, or intimation, that the said wells were necessary to prevent waste, and did not state or show any fact from which any such conclusion could be reached. Wherefore, Intervener says that the Railroad Commission of Texas had no jurisdiction to grant the said permits on the ground that they were necessary to prevent waste.

VII.

If all or any of said Burford wells herein involved are drilled and operated, it will be necessary for Intervener to drill an equidistant offset well to each, in order to lessen the drainage of oil caused thereby from Intervener's said land, which will result in a concentration of wells spaced much more closely than is provided in Rule 37 of the Railroad Commission of Texas, and in uneven spacing of wells and uneven withdrawal of oil from the producing structure, all of which will tend to injure the oil producing structure under Intervener's said land, to prevent production by Intervener of the full equivalent of the recoverable oil thereunder and to cause waste of the oil and gas therein. Under the proration orders of said Railroad Commission, each of the wells on Intervener's said land was, at the time said permit order was granted to Defendant Burford and has ever since been allowed to produce 20 barrels of oil each producing day, by virtue of which Intervener's 50-acre lease had a total daily allowable production of approximately 120 barrels or approximately 2.4 barrels of oil per acre. Under said orders, each well drilled and operated on said alleged 2.33-acre strip will have an allowable of 20 barrels for each producing day, or an average of 8.58 barrels of oil per acre for each well so drilled and operated, being a

total of 34.32 barrels of oil per acre per day for said alleged 2.33-acre strip in the event four wells are drilled and operated thereon. Even if Intervener drills four additional wells on its said 50-acre lease as offsets to said Burford locations, under the proration order in effect at the time said permit order was made, and since, the alleged strip will have a great advantage over Intervener in the production of oil, and will be enabled to drain large quantities of oil from beneath the Intervener's tract and to deprive Intervener thereof. This denies Intervener the equal protection of the law, and deprives it of its property without due process of law, as guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VIII.

Intervener's lease is fully and reasonably developed for the production of oil and gas by the six wells situated thereon at the time said permit order was made, and since; but it will be necessary for Intervener to drill and equip at least one additional well (otherwise unnecessary) as an offset to each well the Defendants Burford and X. Y. Z. Oil & Gas Company are permitted to drill and operate on said 2.33 acres, at a cost to Intervener of approximately Ten Thousand Dollars ($10,000.00) for each additional well. The operation of said wells, or any of them, on said 2.33 acres, with or without the drilling and operation of any offsets thereto, either by Plaintiff or Intervener or others, will cause Intervener's flowing wells to become pumpers sooner than they otherwise would, which will increase the cost of operating same and will cause waste under Intervener's lease and will reduce the amount of oil Intervener would otherwise eventually recover from the sands underneath its lease, and will reduce the market value of Intervener's lease.

For all the injuries and damages herein alleged, including its loss through drainage by said Defendants' wells which alone will far exceed the sum or value of $3,000.00, exclusive of interest and costs, Intervener has no adequate remedy at law; the exact extent of such damages being impossible of accurate ascertainment; said damages are irreparable and Intervener's only practicable and adequate remedy is the injunctive relief herein prayed for.

IX.

Intervener shows that the method adopted by the Railroad Commission in holding said hearing, as alleged in portions of said Amended Original Bill of Complaint herein adopted, has resulted in a denial of a full and proper hearing by said Commission; that the said Commission delegated to an examiner the duty of conducting the hearing, but reserved to itself the decision as to whether the permits should be granted or not; that it did not permit the said examiner to make any finding of fact or recommendation to it with regard to the facts shown by the evidence or as to the propriety of granting the permit; that no transcript or statement of the evidence submitted at said hearing was prepared and submitted to or considered by said Commission before making said permit order; that by reason of this procedure the Intervener has been denied its constitutional right under said section of said Fourteenth Amendment to the Constitution to have a full and proper hearing of said application by said Commission and to have the decision made by said Commission only after hearing all of the evidence. That the action of the Railroad Commission in granting the permit order herein involved, under the circumstances alleged in Part II of said Amended Original Bill of Complaint, denied to Intervener due process of law and the equal protection of the laws as guaranteed to it

by said section of said Fourteenth Amendment to the Constitution of the United States, and the said order, in all respects as alleged, and in view of all the facts pleaded herein and in said Amended Original Bill of Complaint herein adopted, is unreasonable, discriminatory and unjust in its operation as against Intervener, and is in violation of the conservation laws and violates the constitutional rights of Intervener, especially with respect to said section of the Fourteenth Amendment to the Constitution of the United States. That the act of said Railroad Commission in granting said permit without adjusting the allowable production from the wells to be drilled thereunder, as alleged in section (d) of Part 12 of said Amended Original Bill of Complaint, is, as to Intervener, arbitrary, unreasonable, unjust and discriminatory in effect, and authorizes an unlawful taking of Intervener's property without compensation and deprives it of the equal protection of the laws and of due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

X.

X. Y. Z Oil & Gas Company has acquired G. E. Burford's leasehold estate in the 2.33 acres here involved, and has proceeded with operations on, and is now operating, wells on said 2.33 acres under and by virtue of the orders granting permits herein complained of.

Wherefore, all Defendants except X. Y. Z. Oil & Gas Company having been summoned, Intervener prays that process issue requiring Defendant X. Y. Z. Oil & Gas Company to appear and answer herein, and Intervener further prays as does the Plaintiff in the said Amended Original Bill of Complaint heretofore filed herein, and further that mandatory injunction issued to Defendants Burford and X. Y. Z. Oil & Gas Company, ordering that

any well that may have been drilled under said permit order be plugged and effectively sealed in accordance with the rules of the Railroad Commission so as to prevent production of oil therefrom, and that it have judgment for costs and such other relief, general or special, as it may be justly entitled to receive.

DAN MOODY,
Attorney for Intervener, Magnolia Petroleum Company.

Austin, Texas.

Filed 15th day of January, 1940.

ANSWER OF THE DEFENDANT, G. E. BURFORD.

40 (Title Omitted.)

To the Honorable Judge of said Court:

First Defense.

The plaintiff has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter alleged in the complaint.

Second Defense.

The plaintiff fails to state a claim against defendant upon which relief can be granted.

Third Defense.

I.

Defendant admits the allegations contained in paragraph numbered 1 of plaintiff's bill of complaint.

II.

Defendant Burford admits the allegations contained in paragraph numbered 2 of plaintiff's bill of complaint.

III.

Defendant Burford says that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 3 of plaintiff's bill of complaint.

IV.

Defendant Burford admits the allegations contained in paragraph 4 of plaintiff's bill of complaint to the effect that on November 26, 1919, the Railroad Commission of Texas adopted Rule 37 regulating the spacing of oil and gas wells in Texas and providing for exceptions to said Rule. Said defendant admits that said Rule 37 was amended on the various dates as alleged in paragraph numbered 4 of plaintiff's bill of complaint.

V.

Defendant Burford denies the allegations contained in paragraph numbered 4 in plaintiff's bill of complaint to the effect that the Railroad Commission of Texas was without authority to grant an exception to Rule 37 only on the grounds stated in said Rule.

VI.

Defendant Burford admits that on May 29, 1934, Rule 37, as applied to the East Texas Field, was amended and was in effect at the time of the issuance of the permits

complained of by plaintiff. Def ndant alleges that on July 13, 1939, said Rule 37, as applied to the East Texas Field was further amended by the Railroad Commission of Texas effective on said date, a copy of which amendment is attached to the answers of the defendants, Lon A. Smith, G. A. Sadler, and E. O. Thompson, which amendment is hereby adopted and made a part of this answer with the same force and effect as if fully copied herein.

VII.

Defendant Burford denies that the amendment to Rule 37 adopted May 29, 1934, set out on page 6 of plaintiff's original bill of complaint was a valid and binding regulation as applied to this defendant at the time said permit was granted because,

(a) said amendment is arbitrary, discriminatory, and not based upon any public necessity therefore, and deprives this defendant and others similarly circumstanced of the opportunity to develop their property for oil and gas, irrespective of the causes for the subdivision of said property; and

(b) said amendment, even if valid, is not applicable to and cannot be enforced against this defendant for the reason that the 2.33 acre tract owned and operated by this defendant was cut off and subdivided from a tract of 102.33 acres on December 18, 1930, on which date the last 50 acres of said 102.33 acre tract was assigned to Claude Bell and R. A. Graddy and which 50 acres is now operated by Magnolia Petroleum Company, and on February 28, 1931, the west 50 acres of said 102.33 acres was assigned to plaintiff herein; that the subdivision of said 102.33 acres, out of which came the 2.33 acre tract, was made long before the amendment to Rule 37 was adopted

May 29, 1934; that to apply said amendment of May 29, 1934, to plaintiff's 2.33 acres would prevent this defendant from developing and operating his lease on said 2.33 acres according to the rules and regulations in effect, or purporting to have been in effect at the time said subdivision was made.

VIII.

Defendant Burford hereby adopts as a part of his answer, to the same effect as if fully copied herein, paragraphs numbered IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, of the answer filed herein by the defendants, The Railroad Commission of Texas, Lon A. Smith, G. A. Sadler, and E. O. Thompson.

IX.

Defendant Burford admits that he received several telegrams from the attorney for the plaintiff herein to the effect that motions for rehearing would be filed by plaintiff with the Railroad Company, and to the effect that plaintiff would file suit to cancel the permit to drill wells numbers 1, 2, 3, and 4 granted by the Commission on June 2, 1939, as alleged in paragraph numbered 15 of plaintiff's bill of complaint.

X.

This defendant admits that immediately after the Railroad Commission of Texas granted him the permit to drill the four wells on the 2.33 acre strip, he proceeded with the drilling of said wells and continuously pursued the drilling of same and completed the drilling of said four wells before this suit was filed; that about 50 days elapsed from the time said permits were granted until

this suit was filed; that this defendant has paid or has obligated himself to pay approximately $40,000.00 for the drilling of said four wells; that the plaintiff, by its delay in filing this suit, has been guilty of laches in permitting this defendant to expend said sum of $40,000.00 in the drilling of said wells, by reason of which action and conduct on the part of plaintiff, plaintiff should not now be heard to complain because said wells have been drilled.

Wherefore, premises considered, this defendant prays that plaintiff take nothing by its suit, and that this defendant go hence with his costs, and for such other and further relief to which he may be entitled.

(S.) F. L. KUYKENDALL,
Attorney for Defendant G. E. Burford.

Austin, Texas.
Filed 12th day of August, 1939.

ANSWER OF THE DEFENDANT, G. E. BURFORD, TO THE ORIGINAL BILL OF COMPLAINT OF INTERVENER, MAGNOLIA PETROLEUM COMPANY.

44 (Title Omitted.)

First Defense.

Intervener has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter alleged in the complaint.

Second Defense.

Intervener fails to state a claim against defendant upon which relief can be granted.

Third Defense.

I.

Defendant Burford admits that the Railroad Commission of Texas is an agency of the State government, organized and existing under the laws of the States of Texas, and that the defendants, Lon A. Smith, G. A. Sadler and E. O. Thompson, are the elected, qualified and acting members of the said Railroad Commission. Defendant denies that this Court has jurisdiction of this cause under and by virtue of the facts alleged in paragraph Numbered I of the original bill of complaint filed herein by the Sun Oil Company, and by reason of the Federal questions alleged to be presented in the original bill of complaint of intervener.

II.

Defendant Burford says that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Numbered III of intervener's original bill of complaint.

III.

In answer to paragraph Numbered III of intervener's original bill of complaint, defendant Burford adopts, with the same force and effect as if fully copied herein, the answer of the defendants, Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson, to intervener's original bill of complaint, as set out in paragraph Numbered III of said answer.

IV.

In answer to paragraph Numbered IV of intervener's original bill of complaint, the defendant Burford adopts,

with the same force and effect as if fully copied herein, the allegations of his original answer filed herein to the original bill of complaint filed by Sun Oil Company which allegations are set out in paragraphs Numbered 3, 4, 5, 6, 8, 9 and 10 of said answer.

V.

Defendant Burford denies that the amendment to Rule 37 adopted May 29, 1934, set out on page 6 of plaintiff's original bill of complaint was a valid and binding regulation as applied to this defendant at the time said permit was granted because,

(a) said amendment is arbitrary, discriminatory, and not based upon any public necessity therefor, and deprives this defendant and others similarly circumstanced of the opportunity to develop their property for oil and gas, irrespective of the causes for the subdivision of said property; and

(b) said amendment, even if valid, is not applicable to and cannot be enforced against this defendant for the reason that the 2.33 acre tract owned and operated by this defendant was cut off and subdivided from a tract of 102.33 acres on December 18, 1930, on which date the last 50 acres of said 102.33 acre tract was assigned to Claude Bell and R. A. Graddy and which 50 acres is now operated by Magnolia Petroleum Company, and on February 28, 1931, the west 50 acres of said 102.33 acres was assigned to plaintiff herein; that the subdivision of said 102.33 acres, out of which came the 2.33 acre tract, was made long before the amendment to Rule 37 was adopted May 29, 1934; that to apply said amendment of May 29, 1934, to plaintiff's 2.33 acres would prevent this defendant from developing and operating his lease on said 2.33

acres according to the rules and regulations in effect, or purporting to have been in effect at the time said subdivision was made; that said rule, if attempted to be enforced against defendant Burford, would be retroactive in its application and would be in violation of Article 1, Section 16. of of the Constitution of Texas, and would be in violation of the due process clause of the 14th Amendment to the Constitution of the United States.

VI.

Defendant Burford says that he is without knowledge or information sufficient to form a belief as t the truth of the allegations contained in paragraph Numbered V of intervener's original bill of complaint.

VII.

Defendant Burford denies the allegations contained in paragraph Number VI of intervener's complaint.

VIII.

In answer to paragraph Numbered VII of intervener's original bill of complaint, the defendant Burford adopts, with the same force and effect as if fully copied herein, all of the allegations contained in paragraph Numbered VII of the answer filed herein to the intervener's original bill of complaint by the defendants, Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson.

IX.

In answer to paragraph Numbered VIII of intervener's original bill of complaint, the defendant adopts, with the

same force and effect as if fully copied herein, all of the allegations contained in paragraph Numbered VIII of the answer filed herein by the defendants, Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson; and in addition, defendant Burford alleges that intervener does not allege any facts showing or which tend to show that the drilling and producing of said wells by defendant Burford will deprive intervener of an equal opportunity with adjacent landowners to recover its fair share of the oil to which it might be entitled.

X.

Defendant Burford denies the allegations contained in paragraph Numbered IX in intervener's original bill of complaint.

Wherefore, premises considered, defendant Burford prays that plaintiffs take nothing by their suit, and that this defendant go hence with his costs and for such other and further relief to which he may be entitled.

(S.) F. L. KUYKENDALL,
Attorney for Defendant G. E. Burford.

Austin, Texas.

Filed 1st day of September, 1939.

ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, G. A. SADLER AND E. O. THOMPSON TO AMENDED COMPLAINT OF SUN OIL COMPANY.

49 (Title Omitted.)

To said Honorable Court:

First Defense.

The plaintiff has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said

complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter alleged in the complaint.

Second Defense.

The plaintiff fails to state a claim against defendant upon which relief can be granted.

Third Defense.

I.

Defendants admit that the Railroad Commissioner of Texas is a department and agency of the State government, organized and existing under the laws of the State of Texas and located at Austin, Travis County, Texas, and that defendants Lon A. Smith, G. A. Sadler and E. O. Thompson are the duly elected, qualified and acting Members of the Railroad Commission of Texas, are citizens of the State of Texas and that each has an official residence and resides in Austin, Texas, within the Austin Division of the Western District of Texas. Defendants deny that this is a case over which this Court has jurisdiction. As to the residue of the allegations contained in paragraph I of plaintiff's amended complaint, defendants say that they are without knowledge or information sufficient to form a belief as to the truth thereof.

II.

Defendants admit the allegations contained in paragraph 2 of plaintiff's amended complaint.

III.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of

the allegations contained in paragraph No. 3 of said amended complaint.

IV.

Defendants admit the allegations contained in paragraph No. 4 of the amended complaint with reference to the promulgation of Rule 37 and admit that said rule as amended on May 29, 1934, was in effect at the time of the issuance of the permit complained of. Defendants further say that on the 13th day of July, 1939, said rule as applied to the East Texas field was amended by order of the Railroad Commission of Texas of said date.

Defendants deny that portion of paragraph No. IV of plaintiff's complaint, found on page 7 thereof, wherein it is alleged as follows:

"Provided the particular property on which it is proposed to drill a well in exception to said rule has not been subdivided from other properties or created into a separate tract from adjoining properties for development purposes since November 26, 1919."

Defendants deny that portion of paragraph No. IV of plaintiff's complaint found on page 7 thereof, wherein it is alleged as follows:

"Under the law of the State of Texas the creation of a trip or tract of land too narrow to be drilled in compliance with said spacing rules, arising by assignment or subdivision of portions of an original leasehold estate in land does not create a right to an exception to either of the above mentioned spacing rules, and does not create a 'vested right' nor a necessity to drill in order to prevent 'confiscation of property' within the meaning of said terms as used in aforesaid rule."

V.

Defendants admit the allegations contained in paragraph 5 of the amended complaint.

VI.

Defendants admit that Magnolia Petroleum Company was awarded a final judgment in cause No. 54,769 in the District Court of Travis County, Texas, against the Railroad Commission of Texas, the members thereof and Mamie S. Hammonds, O. O. Hammonds and T. S. Schroeder, cancelling a permit issued by the Railroad Commission of Texas to Mamie S. Hammonds by order dated October 11, 1934, permitting the drilling of an oil and gas well on a strip covered by Burford's application at a point 412 feet from the north line and midway between east and west lines of said strip. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations to the effect that "since the entry of said judgment G. E. Burford claims to have acquired title by assignment through Mamie S. Hammonds, O. O. Hammons and T. S. Schroeder, the oil and gas leasehold estate in said strip, and they are the source of such title as he has." Defendants deny that by reason of said judgment the Railroad Commission has no jurisdiction or authority to grant a permit for the drilling of each or either of the locations applied for by defendant Burford in that there existed at the time of the hearing of Burford's application no such change of conditions occurring since such judgment as would entitle said strip to a permit for either of said locations. Defendants say that none of the locations for wells Numbers 1, 2, 3, and 4 for which permits have been granted are situated at or upon the same location as the well permit issued to Mamie S. Hammonds, and on which

suit was brought in cause No. 54,759 in the District Court of Travis County, Texas, and that the judgment therein rendered could have no bearing upon the validity of the permits attacked in this cause of action. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegation to the effect that no additional wells have been drilled since the date of said judgment offsetting the northern part of said strip on which is situated the well location for which permit was canceled by said judgment. Defendants deny that the existing reservoir conditions under said strip are the same and bear the same relation to reservoir conditions in the field generally as at the date of said judgment and date of permit thereby canceled; and that each of the Burford locations is no more necessary as an exception to the spacing rule in said field than the location for which permit was canceled in said judgment, and the drilling of wells on said strip was no more necessary to prevent waste of oil and gas at the date of the several hearings on Burford's applications than at the date of said judgment or at the date of said prior permit.

VII.

Defendants admit the allegations contained in paragraph No. 7 of the amended complaint to the effect that there was then pending in the District Court of Travis County cause No. 53,915, styled Sun Oil Company vs. Railroad Commission, et al, in which suit there is in issue the authority of the Railroad Commission of Texas to grant a permit in exception to the field spacing rules permitting the drilling of a well for oil or gas at the identical location as Burford's location No. 1, and that in said suit the issue is raised that said location is not necessary under either ground of exception to said rule, and that because of its size and the fact of subdivision it

is not entitled to be developed as a separate tract under said rule, said suit being in the nature of an appeal from an order of the Railroad Commission of Texas dated February 1, 1934, granting Mamie S. Hammond special permit to drill said well location in exception to the field spacing rule. Defendant denies that because of the pendency of said suit said Railroad Commission had no jurisdiction to grant defendant Burford a permit to drill his well location No. 1 or any other location on this land and that its order granting Burford's application for permit are illegal and void; because defendants say that on the 17th day of July, 1934, in said cause No. 53,915 in the District Court of Travis County, Texas, there was had a hearing on temporary injunction in the above set out and designated matter, designated cause No. 53,915 in the District Court of Travis County, Texas, and that on said date said Court granted an order restraining Mamie S. Hammonds from drilling her said location No. 1, on the tract in question, and held that her permit was invalid because said permit was issued without notice to adjacent lessees and without hearing thereon. The order granting the injunction expressly stipulated that said injunction was issued without prejudice to the rights of Mamie S. Hammonds to re-apply to the Railroad Commission of Texas for a new permit. Subsequent to the Court's judgment no further hearing has ever been had in said cause. Defendants further allege that in said cause of action to cancel said permit No. 1 and in the petition for injunction no affirmative relief against the Railroad Commission of Texas was asked for, and that no such affirmative relief has ever been granted. Defendants further say that since no motion, notice or hearing was had prior to entry of the order of February 1, 1931, granting Mamie S. Hammonds a permit to drill her said well No. 1, the Railroad Commission was without jurisdiction to try or determine any issue of fact at the hear-

ing upon which said permit was granted. Therefore it accordingly follows that if the Railroad Commission of Texas did not have jurisdiction to try such issue, the Court obtained none by appeal from the orders of the Railroad Commission. Magnolia Petroleum Co. vs. New Process Company, 104 S. W. (2d) 1006 at page 1109.

VIII.

Defendants deny that by reason of the procedure at the hearings before the Railroad Commission upon Burford's applications for wells Numbers 1, 2, 3 and 4, plaintiff has been denied a full and proper hearing by said Commission or that said plaintiff will be deprived of its property without due process of law guaranteed it by the 14th Amendment to the Constitution of the United States.

X.

Defendants deny those allegations in paragraph No. 9 of plaintiff's amended complaint, wherein it is alleged that said testimony so objected to was inadmissible and does not constitute substantial evidence that the drilling of said Burford wells is necessary to prevent waste within the meaning of said field rules. Defendants deny the allegations of paragraph No. 9 of said plaintiff's petition to the effect that said Commission did not make and file separate findings of fact in connection with said Burford application, and the only finding made by said Commission is the finding contained in this order attached hereto as Exhibit "A" and Exhibit "B" to the effect that said four locations are necessary to prevent confiscation of property. Defendants deny the allegations to the effect that the order granting said permits is not sustainable on the ground of necessity to prevent waste. Defendants deny that the order attacked by plaintiff would permit

a taking of plaintiff's property without compensation and without due process of law.

X.

Defendants deny that there was no evidence and no substantial evidence that the drilling of said four locations is necessary to enable Burford to produce an amount of oil equal to the amount of recoverable oil underneath said 2.33 acre strip or negativing undisputed testimony at said hearing that one well on said strip under the proration orders of the Railroad Commission will produce approximately three times as fast in proportion to its underlying reserves as the adjacent portions of the Fuller tract, and will ultimately produce in excess of the equivalent of the recoverable oil under the strip, and four wells would give said strip an undue advantage in draining opportunity over such adjacent portions; or that, disregarding the subdivision of said 2.33 acre strip from the Fuller 50 acre lease the entire area of 52.33 acres needed permits for four additional wells, or that the four locations granted would be the proper locations to be granted on said 52.33 acres if the latter needed any additional wells under either ground of exception to the field spacing rule. Defendants admit that said Burford locations were each situated approximately 24 feet from the east line of said 52.33 acres, being the east line of the strip claimed by Burford, and the same distance from the west line of said strip; that there are three wells offsetting said 52.33 acres to the east, each located approximately 330 feet distant. Defendants say they are without knowledge or information sufficient to form a belief as to the truth of the allegations to the effect that there are a total of seven wells on plaintiff's lease and a total of six wells on Magnolia Petroleum Company's lease on the east fifty acres of the Fuller 100 acre tract; that the west

52.33 acres of said Fuller tract is more densely drilled, and under the Commission's proration order is allowed to produce more oil per acre per day than said Magnolia Petroleum Company's 50 acre lease. Defendants deny that there was no testimony showing or tending to show that any additional wells are necessary to be drilled on the west 52.33 acres of the Fuller trace in order to reasonably protect same from drainage by wells on the east fifty acres of said tract, or showing that said west 52.33 acres at the time of said hearing was not reasonably protected by its existing wells from drainage by wells on the east fifty acres of said Fuller tract. Defendants further deny that there was no testimony at said hearing that the drilling of said Burford locations or either of them is necessary to protect said 52.33 acres from drainage by wells on any other tract adjacent thereto, or that wells on any such other tract were at that time draining oil from said 52.33 acres. Defendants admit that after the hearing had been held, and after the permit granting the four wells had been issued, that said plaintiff in its motion for a rehearing offered to pool its said tract with that of the defendant G. E. Burford, but said defendants say that there is no provision in the laws of the State of Texas requiring a fee owner or leasehold owner to pool his tract with another tract of land in order to produce the oil and gas thereunder, but that Article 6014 (g), Revised Civil Statutes of Texas, 1925, expressly provides "* * * it is not the intent of this act to require * * * that the separately owned properties in any pool be unitized under one management, control or ownership". Defendants deny that no inequity would result from cancellation of the permit herein attacked because of the refusal of the permittee G. E. Burford to pool with plaintiff herein. Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph X

of plaintiff's petition to the effect that the drilling of Burford's four locations on his 2.33 acres as applied for and subsequently granted will make necessary the drilling of approximately sixteen equi-distant offset wells, and would bring about the drilling of a total of seventeen wells on an area three times the width and 660 feet longer than said strip (extending 330 feet further north and 330 feet further south, a total area of approximately ten acres). Defendants deny that it was undisputed that this would bring about a grouping of wells at closer distances than is provided in the field rules, and uneven spacing of wells in this said area, and that such conditions under the Commission's proration order will cause uneven withdrawal of oil and tend to cause the creation of a low pressure area; and such condition would cause less recovery of oil and gas than even spacing of wells under an even withdrawal of oil.

XI.

Defendants deny the allegations contained in paragraph 11 of the amended complaint.

XII.

Defendants deny the allegations contained in paragraph 12 of the amended complaint.

XIII.

Defendants admit in general the allegation contained in the first paragraph of paragraph 13 of plaintiff's amended complaint, found on page 21 thereof. Defendants further admit that under the order of the Railroad Commission in force at the time of granting said permits production from wells in the East Texas field was limited

according to the potential productivity of each well. Defendants further deny that the wells in said field and in the area of the Fuller tract are capable of efficiently draining oil and gas for distances in excess of 466 feet from the well bore.

XIV.

Defendants deny the allegations contained in paragraph 14 of plaintiff's amended complaint.

XV.

Defendants say they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 15 of plaintiff's amended complaint.

XVI.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of plaintiff's amended complaint.

Wherefore, defendants pray that they go hence with their costs, without day, and for such other and further relief as they may be entitled to receive.

GERALD C. MANN,
Attorney General of Texas,
EDGAR W. CALE,
Assistant Attorney General,
JAMFS P. HART,
Assistant Attorney General,
Attorneys for Defendants Railroad Commission of Texas, Don A. Smith, E. O. Thompson and G. A. Sadler.

Acknowledgment of Service.

Service of the foregoing answer by delivery of a copy thereof to the undersigned is acknowledged this .... day of January, 1940.

....,
Attorney for Plaintiff, Sun Oil Company.

....,
Attorney for Intervener, Magnolia Petroleum Company.

....,
Attorney for Defendant, G. E. Burford.

Filed 20th day of January, 1940.

AMENDMENT TO ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, G. A. SADLER AND E. O. THOMPSON TO AMENDED COMPLAINT OF SUN OIL COMPANY.

60 (Title Omitted.)

To said Honorable Court:

Now comes defendants, the Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson, Members of the Railroad Commission of Texas, and by written consent of plaintiff, Sun Oil Company, first had and obtained, amend their answer to the amended complaint of Sun Oil Company as follows:

I.

Amend Paragraph I under Third Defense in said answer by inserting before the last sentence in said paragraph the following:

Defendants specially deny that the matter in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3,000.00).

GERALD C. MANN,
Attorney General of Texas,
EDGAR W. CALE,
Assistant Attorney General,
JAMES P. HART,
Assistant Attorney General,
Attorneys for Defendants,
Railroad Commission of
Texas, Lon A. Smith,
Ernest O. Thompson and
G. A. Sadler.

Austin, Texas.

CONSENT OF FILING OF AMENDMENT AND ACKNOWLEDGMENT OF SERVICE THEREOF.

Consent is given to the filing of the foregoing amendment to the answer of defendants, Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler, and service of the foregoing amendment by delivery of a copy thereof to the undersigned is acknowledged this 10th day of June, 1940.

(S.) J. A. RAUHUT,
Attorney for Plaintiff, Sun Oil
Company.

Filed 10th day of June, 1940.

ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, G. A. SADLER AND E. O. THOMPSON TO THE AMENDED ORIGINAL BILL OF COMPLAINT FILED BY INTERVENER MAGNOLIA PETROLEUM COMPANY.

62 (Title Omitted.)

To said Honorable Court:

First Defense.

The intervener has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said amended complaint that there is a lack of jurisdiction in this said Honorable Court over the subject matter alleged in the amended complaint.

Second Defense.

The intervener fails to state a claim against defendants upon which relief can be granted.

Third Defense.

I.

Defendants admit that the Railroad Commission of Texas is a department and agency of the State government, organized and existing under the laws of the State of Texas located at Austin, Travis County, Texas, and that defendants Lon A. Smith, G. A. Sadler and E. O. Thompson are the duly elected, qualified and acting members of the Railroad Commission of Texas, are citizens of the State of Texas and that each has an official residence and resides in Austin, Texas, within the Austin Division of

the Western District of Texas; defendants deny that by reason of the facts alleged in part I of the amended original bill of complaint filed herein by the Sun Oil Company, this Court has jurisdiction of this cause, and by reason of the Federal questions alleged to be herein presented and of said statute this Court has further jurisdiction of the cause of action presented by this intervention. As to the residue of the allegations contained in paragraph I of intervener's amended complaint, defendants say that they are without knowledge or information sufficient to form a belief as to the truth thereof.

II.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph II of the intervener's amended complaint.

III.

In answer to paragraph III of intervener's amended complaint, defendants say they are without knowledge or information sufficient to form a belief as to the truth of the allegations made in said paragraph III to the effect that the intervener is interested in the subject matter of this cause and in the effort herein made to cancel and hold for naught the permit order of the Railroad Commission of Texas herein involved. Further, defendants say they are without sufficient knowledge or information to form a belief as to the truth of the allegation to the effect that any wells that may be drilled upon said alleged strip of land will drain oil from intervener's said land, being oil that belongs to and would otherwise be produced by it which drainage of oil can be minimized but not entirely prevented by the drilling by intervener of an

off-set well, otherwise unnecessary to each well drilled on said strip at a cost of over $10,000.00 for each well. Defendants deny that the drilling and operation of any well on said strip will further injure intervener in that the operation thereof either with or without off-sets thereto will cause waste as herein alleged and will also cause earlier reduction in the pressure in the oil producing structure under intervener's lease to the point where the gas will come out of solution in the oil therein, thus rendering the oil more viscous and causing it to pass less readily through said structure, and causing the wells of intervener to become pumping wells sooner than they otherwise would, increasing the expense of production of oil from said land by intervener, and reducing the market value of its said lease. Defendants further say that even if the facts above stated were true, which is not admitted, but which is specifically denied, that said intervener would not be entitled to the relief prayed for, for the reason that intervener would not be entitled to the relief prayed for, for the reason that intervener has failed to exhaust all of its available administrative remedies, in that said intervener has wholly failed to allege that it has applied to the Railroad Commission of Texas for additional permit or permits to correct the alleged discriminations complained of, or for any other relief of whatsoever sort, kind, character or nature to correct the alleged discriminations complained of herein.

IV.

In answer to paragraph IV of intervener's amended complaint, defendant Railroad Commission adopts, with like effect as if herein copied, all allegations of its amended answer filed herein to the amended original bill of complaint of the Sun Oil Company contained in and under its third defense, designated paragraphs num-

bers III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XV.

V.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph No. V of the intervener's amended complaint.

VI.

Defendants deny the allegations contained in paragraph No. VI of the intervener's amended complaint.

VII.

Defendants say that they are without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of the intervener's amended complaint wherein it is alleged, "If all or any of said Burford wells herein involved are drilled and operated, * * * will result in a concentration of wells spaced much more closely than is provided in Rule 37 of the Railroad Commission of Texas and in uneven spacing of wells and uneven withdrawal of oil from the producing structure, all of which will tend to injure the oil producing structure on the intervener's said land, to prevent production by intervener of the full equivalent of the recoverable oil thereunder, and to cause waste of the oil and gas therein". Defendants admit that portion of paragraph VII of intervener's amended complaint which read as follows: "Under the proration orders of said Railroad Commission, each of the wells on intervener's land was at the time said permit order was granted to defendant Burford and has ever since been

allowed to produce 20 barrels of oil each producing day, by virtue of which intervener's 50-acre lease has a total allowable production of approximately 120 barrels, approximately 2.4 barrels of oil per acre". In this connection defendants further allege that said intervener has neither applied to said Railroad Commission of Texas for an additional permit or permits to drill upon its said tract of land, nor has it alleged that it has been refused such relief to increase the density of drilling upon its said tract of land, whereby and as a result whereof, the total daily allowable upon its said 50 acres of land would be increased by an even withdrawal of the recoverable oil lying thereunder. Defendants admit that portion of paragraph VII of intervener's amended complaint, wherein it is alleged, "Defendant Burford on said alleged 2.33-acre strip will have an allowable of 20 barrels each producing day, or an average of 8.5 barrels of oil per acre from each well so drilled and operated, being a total of 34.32 barrels of oil per acre per day for said alleged 2.33-acre strip in the event four wells are drilled and operated thereon". Defendants deny that the intervener is being denied equal protection of the law, that said order deprives it of its property without due process of law as guaranteed to it by Section I of the Fourteenth Amendment of the Constitution of the United States, and further says that plaintiff has not exhausted its administrative remedies to correct the alleged discrimination complained of in that it has failed to allege that it has either applied to said Railroad Commission for an additional permit or permits to drill more wells or that it has been refused permit or permits to drill wells on its said tract or tracts, or that it has in any other manner or means asked for or been refused any other relief to correct the so-called discriminations which it is now complaining of.

VIII.

Defendants say they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII of the intervener's amended complaint wherein it is alleged: "Intervener's lease is fully and reasonably developed for the production of oil and gas by the six wells situated thereon at the time said permit order was made, and since; but it will be necessary for intervener to drill and equip one additional well (otherwise unnecessary) as an offset for each well defendant Burford is permitted to drill and operate on said 2.33 acres, at a cost to intervener of approximately $10,000.00 for each additional well". Defendants further say that the costs of drilling offsets is not a proper matter to be taken into consideration by this said Honorable Court in the contest of a ruling of the Railroad Commission of Texas. Defendants deny the allegation in paragraph VIII of intervener's amended complaint to the effect that, "The operation of said well, or any of them, by defendant Burford, with or without the drilling and operation of any off-sets thereto, either by plaintiff or intervener or others, will cause intervener's flowing wells to become pumpers sooner than they otherwise would, which will increase the cost of operating same and will cause waste on intervener's lease, and will reduce the amount of oil intervener would eventually recover from the sands underneath his lease and will reduce the market value of intervener's lease". Defendants further deny the allegations in paragraph VIII of said intervener's amended complaint wherein it is alleged: "For all the injuries and damages herein alleged, including the loss to the plaintiff by Burford's well, which alone will far exceed the sum or value of $3,000.00, exclusive of interest and costs, intervener has no adequate remedy at law; the exact extent of such damages being impossible

of accurate ascertainment; said damages are irreparable and intervener's only practicable and adequate remedy is the injunctive relief herein prayed for."

IX.

Defendants deny the allegations contained in paragraph IX of intervener's amended complaint.

X.

Defendants say that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X of intervener's amended bill of complaint.

Wherefore, defendants pray that they go hence with their costs, without day, and for such other and further relief as they may be entitled to receive.

GERALD C. MANN,
Attorney General of Texas,
EDGAR W. CALE,
Assistant Attorney General,
JAMES P. HART,
Assistant Attorney General,
Attorneys for Defendants Railroad Commission of Texas, Lon A. Smith, E. O. Thompson and G. A. Sadler.

Acknowledgment of Service.

Service of the foregoing answer by delivery of a copy thereof to undersigned is acknowledged this .... day of January, 1940.

....,
Attorney for Intervener, Magnolia Petroleum Company.

....,
Attorney for Plaintiff, Sun Oil Company.

....,
Attorney for Defendant, G. E. Burford.

Filed 20th day of January, 1940.

AMENDMENT TO ANSWER OF DEFENDANTS RAILROAD COMMISSION OF TEXAS, LON A. SMITH, G. A. SADLER AND E. O. THOMPSON TO AMENDED BILL OF COMPLAINT OF MAGNOLIA PETROLEUM COMPANY.

69 (Title Omitted.)

To said Honorable Court:

Now come defendants, the Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson, Members of the Railroad Commission of Texas, and by written consent of intervener, Magnolia Petroleum Company, first had and obtained, amend their answer to the amended bill of complaint of Magnolia Petroleum Company as follows:

I.

Amend Paragraph I under Third Defense in said answer by inserting before the last sentence in said paragraph the following:

Defendants specially deny that the matter in controversy, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars ($3000.00).

GERALD C. MANN,
Attorney General of Texas,
EDGAR W. CALE,
Assistant Attorney General,
JAMES P. HART,
Assistant Attorney General,
Attorneys for Defendants,
Railroad Commission of
Texas, Lon A. Smith,
Ernest O. Thompson and
G. A. Sadler.

Austin, Texas.

CONSENT OF FILING OF AMENDMENT AND ACKNOWLEDGMENT OF SERVICE THEREOF.

Consent is given to the filing of the foregoing amendment to the answer of defendants, Railroad Commission of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler, and service of the foregoing amendment by delivery of a copy thereof to the undersigned is acknowledged this 10th day of June, 1940.

(S.) DAN MOODY,
Attorney for Intervener, Magnolia Petroleum Company.

Filed 10th day of June, 1940.

ANSWER OF DEFENDANT X. Y. Z. OIL & GAS COMPANY TO THE AMENDED COMPLAINT OF SUN OIL COMPANY.

71 (Title Omitted.)

To the Honorable Judge of said Court:

First Defense.

The plaintiff has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter alleged in the complaint.

Second Defense.

The plaintiff fails to state a claim against defendant upon which relief can be granted.

Third Defense.

I.

Defendant admits that the Railroad Commission of Texas is a department and agency of the State government, organized and existing under the laws of the State of Texas and located at Austin, Travis County, Texas, and that defendants Lon A. Smith, G. A. Sadler and E. O. Thompson are the duly elected, qualified and acting Members of the Railroad Commission of Texas, are citizens of the State of Texas and that each has an official residence and resides in Austin, Texas, within the Austin Division of the Western District of Texas. Defendant denies that this is a case over which this Court has jurisdiction. As to the residue of the allegations contained

in paragraph I of plaintiff's amended complaint, defendant says that it is without knowledge or information sufficient to form a belief as to the truth thereof.

II.

Defendant admits the allegations contained in paragraph 2 of plaintiff's amended complaint.

III.

Defendant admits the allegations contained in paragraph 3 of said amended complaint.

IV.

This defendant admits the allegations contained in paragraph 4 of said amended complaint to the effect that on November 26, 1919, the Railroad Commission of Texas adopted Rule 37 regulating the spacing of oil and gas wells in Texas and providing for the granting of exceptions to said rule. This defendant admits that said Rule 37 was amended on the various dates as alleged in said paragraph numbered 4. This defendant further says that said Rule 37 as applied to the East Texas field was amended by order of the Railroad Commission on July 13, 1939, a copy of which amendment is attached to the original answer of the defendants Lon A. Smith, G. A. Sadler, and E. O. Thompson, which amendment is hereby adopted and made a part of this answer with the same force and effect as if fully copied herein.

V.

This defendant denies that the amendment to Rule 37 adopted May 29, 1934, set out on Page 6 of plaintiff's

amended complaint, was a valid and binding regulation as applied to this defendant at the time said permits were granted, because,

(a) said amendment is arbitrary, discriminatory, and not based upon any public necessity therefor, and deprives this defendant and others similarly situated of the opportunity to develop their property for oil and gas, irrespective of the causes bringing about such subdivision; and

(b) said amendment, even if valid, is not applicable to and cannot be enforced against this defendant for the reason that the 2.33 acre tract owned and operated by this defendant was cut off and subdivided from a tract of 102.33 acres on December 18, 1930, on which date the last 50 acres of said 102.23 acre tract was assigned to Claude Bell and R. A. Graddy and which 50 acres is now operated by Magnolia Petroleum Company, and on February 26, 1931, the west 50 acres of said 102.33 acres was assigned to plaintiff herein; that the subdivision of said 102.33 acres, out of which came the 2.33 acre tract, was made long before the amendment to Rule 37 was adopted May 29, 1934; that to apply said amendment of May 29, 1934, to plaintiff's 2.33 acres would prevent this defendant from developing and operating its lease on said 2.33 acres according to the rules and regulations in effect, or purporting to have been in effect at the time said subdivision was made and would be in violation of Article 1, Section 16, of the Texas Constitution and of the Constitution of the United States.

VI.

This defendant admits the allegations contained in paragraph numbered 5 of said amended complaint.

VII.

This defendant admits that Magnolia Petroleum Company was awarded a final judgment in Cause No. 54,769 in the District Court of Travis County, Texas, cancelling a permit issued by the Railroad Commission of Texas to Mamie S. Hammonds on October 11, 1934, as set out on Page 9 of plaintiff's amended bill of complaint. This defendant admits that G. E. Burford acquired title to the oil and gas leasehold estate in said strip from Mamie S. Hammonds, O. O. Hammonds and T. S. Schroeder, and that this defendant has acquired from G. E. Burford by assignment title to the lease covering said strip of land. This defendant denies the allegations on Page 10 of plaintiff's amended bill of complaint wherein it is alleged that it was in issue in said case that said well was not necessary to be drilled and operated either for the purpose of preventing waste of oil and gas or for the purpose of protecting vested rights of the owner of the leasehold estate in said strip, and that by reason of the subdivision the strip was not entitled to be developed as a separate tract under the field spacing rule, and said issues were necessarily adjudicated in said judgment. Defendant further denies that by reason of said judgment the Railroad Commission had no jurisdiction or authority to grant a permit for the drilling of each or either of the locations applied for by defendant Burford in that there existed at the time of the hearings on Burford's application no such change of conditions occurring since said judgment as would entitle said strip to a permit for each or either of said locations. This defendant further says that the permit location involved in Cause No. 544,759, referred to in paragraph 6 of plaintiff's amended bill of complaint, is not the same as wells Nos. 1, 2, 3 and 4 or either of them involved in this cause.

VIII.

This defendant denies the allegations in paragraph 6 of said amended bill of complaint to the effect that the existing reservoir conditions under said strip are the same and bear the same relation to reservoir conditions in the field generally as at the date of said judgment and date of permit thereby canceled and that each of the Burford locations is no more necessary as an exception to the spacing rule in said field than the location for which permit was canceled in said judgment, and the drilling of lease on said strip was no more necessary to prevent waste of oil and gas at the dates of the several hearings on Burford's application than at the date of said judgment or at the date of said prior permit.

IX.

In answer to paragraph numbered 7 of plaintiff's amended bill of complaint this defendant hereby adopts as if fully copied herein paragraph numbered VII of the answer filed herein by the defendants, The Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson, to plaintiff's amended bill of complaint.

X.

This defendant denies that the proceedings before The Railroad Commission involving the application of G. E. Burford for a permit to drill wells Nos. 1, 2, 3 and 4 were illegal or unlawful, or denied to plaintiff a full and proper hearing by said Commission, or that by reason of such procedure plaintiff has been or will be deprived of its property without due process of law guaranteed it by the 14th Amendment to the Constitution of the United States.

XI.

In reply to paragraph numbered 9 of plaintiff's amended bill of complaint this defendant admits and says that in support of its application for permit to drill wells Nos. 1, 2, 3 and 4 on said strip G. E. Burford offered as a witness an experienced and well qualified petroleum engineer, who testified, in part, substantially as set out in said paragraph numbered 9 but that said petroleum engineer offered testimony showing that said permits were necessary both to prevent confiscation of property and to prevent waste.

Further answering the allegations of paragraph numbered 9 of plaintiff's amended bill of complaint this defendant adopts to the same force and effect as if fully copied herein paragraph numbered IX of the answer to plaintiff's amended bill of complaint filed herein by the defendants, The Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson.

This defendant further shows that at the time of the various hearings before The Railroad Commission of Texas, which resulted in the granting of the permit to drill said four wells, the applicant for said permits offered in evidence a map or plat showing the number of wells located on the 50 acre tract of plaintiff, the 50 acre tract of intervener Magnolia Petroleum Company, and the 2.33 acre tract of this defendant, and which map also showed the location of wells on acreage surrounding the above-mentioned three tracts; that said exhibit so offered at the hearing before the Railroad Commission shows there is no production adjoining the acreage involved herein on the east; that on the acreage six times the area of the above-mentioned three tracts of land totalling 102.33 acres and immediately surrounding said three tracts of land there was one well for

each 6.2 acres; that including the four wells granted in the permit involved herein, the density of the Fuller 102.33 acre tract would be one well per 6 acres, such acreage considered being an extra six times the size of said Fuller 102.33 acre tract; that such evidence was legal, competent, substantial and uncontroverted and clearly showed that even if the Fuller 102.33 acre tract should be considered as a whole four additional wells were needed on said 102.33 acre tract in order to make such tract have substantially the same density as the area six times the size of the Fuller tract and surrounding such said Fuller tract.

This defendant further shows that at said several hearings before the Railroad Commission the applicant for said permit offered legal, competent and substantial evidence which, if believed, not only justified but required the Railroad Commission of Texas to grant applicant a permit to drill said four wells in order to prevent the adjoining lease owners from confiscating the property to which this defendant was entitled by virtue of its ownership of said 2.33 acre tract, but also such legal, competent and substantial testimony, if believed, showed that such permit should have been granted to drill said four wells in order to prevent waste.

XII.

In reply to paragraph numbered 10 of plaintiff's amended bill of complaint this defendant adopts to the same effect as if fully copied herein paragraph numbered 10 of the answer filed herein by the defendants the Railroad Commission of Texas, Lon A. Smith, G. A. Sadler and E. O. Thompson to plaintiff's amended bill of complaint.

XIII.

This defendant denies the allegations contained in paragraph numbered 11 of plaintiff's amended bill of compiaint.

XIV.

This defendant denies the allegations contained in paragraph numbered 12 of plaintiff's amended bill of complaint.

XV.

This defendant denies the allegations in paragraph 13 of plaintiff's amended bill of complaint to the effect that the oil bearing said in the East Texas oil field is a blanket sand and is of substantially uniform thickness, porosity, permeability and saturation under said 2.33 acre tract involved herein and the surrounding area, except the sand becomes thicker west of the strip and thinner to the east. As to the remainder of the allegations in the first paragraph of paragraph numbered 13 this defendant is without knowledge or information sufficient to form a belief as to the truth of such allegation. This defendant admits that under the order of the Railroad Commission in force at the time said permits were granted production from wells in the East Texas field was limited according to the potential productivity of each well. This defendant denies that wells in said field and in the area of the Fuller tract are capable of efficiently draining oil and gas for distances in excess of 466 feet from the well bore.

XVI.

This defendant denies the allegations contained in paragraph numbered 14 of plaintiff's amended bill of complaint.

XVII.

This defendant denies that it received several telegrams from the plaintiff advising it that plaintiff would

file suit to cancel the permit involved herein, but this defendant says that the defendant G. E. Burford received a telegram from the attorney for plaintiff that motions for rehearing would be filed with the Railroad Commission and that suit would be filed to cancel the permit to drill wells Nos. 1, 2, 3 and 4 granted by the Commission on June 2, 1939; that on the last day of the twenty day period allowed by the Railroad Commission for filing motions for rehearing plaintiff, through its attorney, did file a motion for rehearing.

XVIII.

This defendant admits that immediately after the Railroad Commission of Texas granted the permit involved herein to drill said wells Nos. 1, 2, 3 and 4, it proceeded with the drilling of said wells and continuously pursued the drilling of same and completed the drilling of said four wells before this suit was filed; that about 50 days elapsed from the time said permits were granted until this suit was filed; that this defendant has paid, or has obligated himself to pay, approximately $40,000.00 for the drilling of said wells; that there are outstanding against said wells at the time same were completed oil payments in the sum of $28,500.00. In this connection, this defendant says that the telegrams sent to G. E. Burford by the attorney for plaintiff, referred to in paragraph numbered 15 of plaintiff's amended bill of complaint, were not sufficient to apprise this defendant that a motion for a rehearing would be filed or suit be filed, and even if same might be considered notice they were given for the purpose of attempting by threats to prevent this defendant from entering upon said tract and drilling said wells; that waiting until the last day of the twenty day period to file a motion for a rehearing constituted an attempt to delay this defendant in drilling said wells; that plaintiff, through its agents and em-

ployees, knew that this defendant was proceeding with the drilling of said wells but sat by and failed and refused to take any action to enjoin this defendant from so drilling said wells, and because of such conduct on the part of plaintiff it has been guilty of laches and is now estopped to deny the validity of the permit granting this defendant the right to drill said four wells.

XIX.

This defendant admits the allegations contained in paragraph numbered 16 of plaintiff's amended bill of complaint.

Wherefore, premises considered, this defendant prays that plaintiff take nothing by its suit and that it go hence with its costs without day, and for such other and further relief to which it may be entitled.

(S.) EVERETT PETRY,

Tulsa, Oklahoma.

(S.) F. L. KUYKENDALL,

Attorneys for Defendant X. Y. Z. Oil and Gas Company.

Austin, Texas.

A copy of the foregoing answer of X. Y. Z. Oil & Gas Company was received by us on this the 3rd day of February, A. D. 1940.

(S.) J. A. RAUHUT,

Attorney for plaintiff, Sun Oil Company.

....,

Attorney for intervener, Magnolia Petroleum Company.

....,

Attorney for defendant, Railroad Commission of Texas.

Filed 5th day of February, 1940.

81 ANSWER OF DEFENDANT X. Y. Z. OIL & GAS COMPANY TO THE AMENDED COMPLAINT OF INTERVENER MAGNOLIA PETROLEUM COMPANY.

(Title Omitted.)

To the Honorable Judge of Said Court:

First Defense.

The plaintiff has failed to state a claim over which this Honorable Court has jurisdiction, and it appears from said complaint that there is a lack of jurisdiction in this Honorable Court over the subject matter alleged in the complaint.

Second Defense.

The plaintiff fails to state a claim against defendant upon which relief can be granted.

Third Defense.

I.

This defendant denies that by reason of the facts alleged in part I of the amended original bill of complaint filed herein by Sun Oil Company this Court has jurisdiction of this cause and by reason of the federal questions alleged to be presented herein and of said statute this Court has jurisdiction of the cause of action presented by this intervention, and this defendant further denies that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. This defendant admits the remaining allegations contained in paragraph numbered I of the amended bill of complaint of intervener.

II.

This defendant says that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered II of the amended complaint of intervener.

III.

In answer to paragraph numbered III of the amended bill of complaint of intervener, this defendant adopts with the same force and effect as if herein set out, paragraph numbered III of the answer of the Railroad Commission of Texas to the amended bill of complaint of said intervener.

IV.

In answer to paragraph numbered IV of the amended complaint of intervener, this defendant hereby adopts with the same force and effect as if fully copied herein, its answer to the amended bill of complaint of Sun Oil Company as set out in such answer in paragraphs numbered III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII.

V.

In reply to the allegations in paragraph numbered V of intervener's amended original complaint, this defendant says that it is without knowledge or information sufficient to form a belief as to the truth of such allegations.

VI.

This defendant denies the allegations contained in paragraph numbered VI of the amended complaint of intervener.

VII.

In reply to paragraph numbered VII of the amended complaint of intervener, this defendant denies the allegations in said paragraph that "Even if intervener drills four additional wells on its 50 acre lease as offsets to said Burford locations, under the proration order in effect at the time said permit order was made, and since, the alleged strip will have a great advantage over intervener in the production of oil, and will be enabled to drain large quantities of oil from beneath the intervener's tract and to deprive intervener thereof. This denies intervener the equal protection of the law and deprives it of its property without due process of law, as guaranteed to it by Section 1 of the Fourteenth Amendment to the Constitution of the United States."

This defendant says that it is without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of the intervener's amended complaint wherein it is alleged, "If all or any of said Burford wells herein involved are drilled and operated, * * * will result in a concentration of wells spaced much more closely than is provided in Rule 37 of the Railroad Commission of Texas and in uneven spacing of wells and uneven withdrawal of oil from the producing structure, all of which will tend to injure the oil producing structure on the intervener's said land, to prevent production by intervener of the full equivalent of the recoverable oil thereunder, and to cause waste of the oil and gas therein." Defendant admits that portion of paragraph VII of intervener's amended complaint which reads as follows: "Under the proration orders of said Railroad Commission, each of the wells on intervener's land was at the time said permit order was granted to defendant Burford and has ever since been allowed to produce 20 barrels of oil each pro-

ducing day, by virtue of which intervener's 50-acre lease has a total allowable production of approximately 120 barrels, approximately 2.4 barrels of oil per acre."

This defendant admits that portion of paragraph VII of intervener's amended complaint, wherein it is alleged, "Defendant Burford on said alleged 2.33-acre strip will have an allowable of 20 barrels each producing day, or an average of 8.58 barrels of oil per acre from each well so drilled and operated, being a total of 34.32 barrels of oil per acre per day for said alleged 2.33-acre strip in the event four wells are drilled and operated thereon."

This defendant further shows to the Court that intervener applied to the Railroad Commission of Texas for a permit to drill its well No. 7 at a point 22.3 feet from the east boundary line of this defendant's 2.33-acre lease and directly east of this defendant's well No. 2; that said application was numbered 28413 on the docket of the Railroad Commission of Texas; that said application came on for hearing on May 10, 1939 and was granted by an order of the Railroad Commission of Texas dated September 8, 1939.

This defendant further shows that said intervener made application to the Railroad Commission of Texas for a permit to drill its well No. 8 at a point 24.8 feet east of the east boundary line of this defendant's 2.33-acre tract and directly east of this defendant's well No. 1; that said hearing was set for July 10, 1939 but for some reason unknown to this defendant intervener, on July 10, 1939, withdrew said application.

This defendant says that the action of intervener in applying for permits to drill wells Nos. 7 and 8 constituted an intention on the part of intervener to exhaust

its administrative remedies, and that the failure of intervener to apply for additional permits to drill additional wells on its acreage, which additional wells intervener would be entitled to drill, constitutes a failure on the part of intervener to exhaust its administrative remedies.

VIII.

In reply to paragraph nmbered VIII of intervener's amended bill of complaint, this defendant adopts with the same force and effect as if fully copied herein, the answer of the Railroad Commission of Texas to paragraph numbered VIII of intervener's amended bill of complaint, as reflected by paragraph numbered VIII of said answer of the Railroad Commission.

IX.

This defendant denies the allegations contained in paragraph numbered IX of the amended bill of complaint of intervener.

X.

This defendant admits the allegations contained in paragraph numbered X of intervener's amended bill of complaint.

XI.

This defendant says that immediately after the Railroad Commission of Texas granted the permit involved herein to drill said wells Nos. 1, 2, 3 and 4, it proceeded with the drilling of said wells and continuously pursued and completed the drilling of same before this suit was filed; that about 60 days elapsed from the time said

permit was granted until intervener filed its application to intervene herein; that during said 60 day period intervener did not file suit to enjoin this defendant from drilling said lease; that this defendant has paid, or has obligated itself to pay, approximately $40,000.00 for the drilling and equipping of said wells; that at the time said wells were completed there were outstanding against said wells oil payments in approximate sum of $28,500.00. This defendant further says that intervener, through its agents and employees, knew that this defendant was proceeding with the drilling of said wells and permitted this defendant to expend said sums of money above named in the drilling of said wells, and that because of such conduct on the part of intervener it has been guilty of laches and is now, or should be, estopped to deny the validity of the permit granting this defendant the right to drill said four wells. This defendant further shows that at no time after said permit was granted on June 2, 1939 did this intervener advise this defendant, or the defendant G. E. Burford, that it has filed a motion for a rehearing with the Railroad Commission of Texas, or that it would file suit to cancel said permit if such permit was finally granted to G. E. Burford; that because of such conduct on the part of intervener, it is now and should be estopped to deny the validity of the permit involved herein.

Wherefore, this defendant prays that intervener take nothing by its suit and that this defendant go hence with its costs, and for such other relief to which it may be entitled.

(S.) EVERETT PETRY,

Tulsa, Oklahoma.

F. L. KUYKENDALL,
Attorneys for Defendant X. Y. Z. Oil & Gas Company.

Austin, Texas.

A copy of the foregoing answer of X. Y. Z. Oil & Gas Company was received by us on this the 6th day of February, A. D. 1940.

(S.) DAN MOODY,
Attorney for intervener, Magnolia Petroleum Company.

.....,
Attorney for defendant, Railroad Commission of Texas.

Filed 6th day of February, 1940.

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87 JUDGMENT.

In the District Court of the United States for the Western District of Texas, Austin Division.

Sun Oil Company, Plaintiff, and Magnolia Petroleum Company, Intervener,
vs. Civil Action No. 28.
G. E. Burford, The Railroad Commission of Texas, et al., Defendants.

This action came on for hearing on the 5th day of February, 1941, and came the plaintiff, the intervener, and the defendants, by their attorneys of record, and all parties announced ready for trial; whereupon the Court proceeded to hear evidence and argument of counsel, and on the 6th day of February, 1941, announced the opinion of the Court that the issues of law and fact are with the defendants.

It is therefore Ordered, Adjudged and Decreed by the Court that the plaintiff's complaint and the intervener's complaint are dismissed, and that the defendants do have

and recover of and from the plaintiff and the intervener their costs.

Done at Austin, Texas, this 7th day of February, 1941.

(S.) ROBERT J. McMILLAN,
Judge, District Court of the United States for the Western District of Texas.

Entered: Civ. Or. B., Vol. 1, p. 176.

Filed Feb. 7th, 1941.

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88 FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Title Omitted.)

Findings of Fact.

I.

By this section, plaintiff and intervener challenged the validity of an order of the Railroad Commission of Texas in Rule 37 case No. 26,868, dated the 2nd day of June, 1939, which granted the defendant, G. E. Burford permission to drill four wells on his W. R. Fuller 2.33 acre oil and gas lease in the D. Sanchez Survey, Gregg County, Texas, in the East Texas oil field. A copy of said order is attached to plaintiff's bill of complaint and marked Exhibit "B" thereto.

II.

The Court finds that the residences and citizenship of the respective parties plaintiff, intervener and parties

defendant herein are as alleged in plaintiff's bill of complaint and that the amount in controversy herein exceeds $3,000.00 exclusive of interest and costs.

III.

The Court finds that the ownership of the respective properties of the plaintiff, intervener, and defendant G. E. Burford are as described and set forth in plaintiff's bill of complaint.

IV.

The Court finds that the challenged order of the Railroad Commission was entered subsequent to a hearing held, after due notice, before an examiner of the Railroad Commission, on May 19, 1939; that prior to such hearing, two other hearings on the same matter had been held on August 15, 1938, and January 31, 1939, and that the testimony at such hearings had been transcribed and such transcripts were available to the Railroad Commission prior to May 19, 1939; that the evidence at the hearing of May 19, 1939, was cumulative of the evidence already heard at such two prior hearings; that, although the evidence at the hearing of May 19, 1939, was not transcribed at the time the Railroad Commission entered the challenged order on June 2, 1939, the Railroad Commission then had before it (in addition to the file containing all applications, motions, maps, documentary evidence introduced at such hearings, and the transcripts of the two prior hearings) the written memorandum of its examiner summarizing the testimony and the contentions of the parties at the hearing of May 19, 1939, and conferred with such examiner before entering said order of June 2, 1939; and that the evidence at the hearing of May 19, 1939, was transcribed on June 9, 1939, and was available to the Railroad Commission prior to its final

order of July 10, 1939, overruling the motion for rehearing of the plaintiff and the intervener. The Court therefore finds that the plaintiff and the intervener have failed to prove that the Railroad Commission did not give proper consideration to the evidence introduced at the hearings on the matter here involved or that the plaintiff and the intervener have been denied such a hearing as the law contemplates.

V.

The Court finds that, as far as the matter of res judicata is concerned, the conditions have so changed in the East Texas Oil Field and on the leases adjacent to defendant Burford's lease since the Railroad Commission of Texas granted Mamie S. Hammonds an exception under the provisions of Rule 37 to drill her Well No. 1 on the W. R. Fuller's 2.81 acres Sanchez survey, Gregg County, Texas, on the first day of February, 1934, for the purpose of protection of vested rights to the disadvantage of permittee's tract, that the judgment in Cause No. 54,679, in the 53rd District Court of Travis County, Texas, entitled Sun Oil Company, et al, vs. Mamie S. Hammonds, et al, does not make the validity of the permit in the case res judicata.

Conclusions of Law.

I.

The Court concludes that it has jurisdiction of the parties and of the subject matter of this action.

II.

The Court concludes that the challenged order of the Railroad Commission of Texas does not violate any of

the rights of the plaintiff or the intervener under the 14th amendment to the Constitution of the United States.

III.

The Court is of the opinion that the various matters of state law raised present no federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction.

It has heretofore been thought to be true that in a proper case, where jurisdiction rested either because of diversity or federal question, the Court would necessarily interpret and apply the state law where it applied to issues involved. However, there are expressions in the two Rowan & Nichols cases which seem to indicate that as to these conservation cases, the parties should be relegated to the state Courts. The Court very seriously doubts whether in one of these oil regulation cases the Federal Courts should attempt to interfere with the regular processes of the Commission in regulating these fields unless some condition is uncovered more extreme than those on which the Courts have heretofore felt warranted in acting. This seems to be the purport of the holding of the Supreme Court in the first Rowan & Nichols case where, in the last paragraph of the majority opinion, it is said:

"Plainly these are not issues for our arbitrament. The state was confronted with its general problem of proration and with the special relation to it of the small tracts in the particular configuration of the East Texas field. It has chosen to meet these problems through the day-to-day exertions of a body specially entrusted with the task because presumably competent to deal with it. In striking the balances that have to be struck with the complicated and subtle factors that must enter

into such judgments, the Commission has observed established procedure. If the history of proration is any guide, the present order is but one more item in a continuous series of adjustments. It is not for the Federal Courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."

In the second Rowan & Nichols case, the Supreme Court said:

" * * * In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state Courts. 311 U. S. ——."

See also the amendment to the first decision handed down on October 21, 1940, 61 Sup. Ct. Rep., p. 66.

Dated this 22nd day of February, 1941.

(S.) ROBERT J. McMILLAN,
United States District Judge.

Filed Feb. 22, 1941.

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92 PLAINTIFF'S AND INTERVENER'S OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REQUEST FOR MODIFICATION OF SAME AND FOR ADDITIONAL FINDINGS.

(Title Omitted.)

To the Honorable Judge of Said Court:

Plaintiff and intervener object and except to the Findings of Fact and Conclusions of Law filed herein on Feb-

ruary 22, 1941, and move that they be corrected and modified, and that additional Findings of Fact be made as herein stated and suggested:

1. Finding No. 1 fails to state that plaintiff and intervener also challenge the order dated March 25, 1939, granting Burford permit to drill well No. 1 on the same strip, copy of which order is attached to the complaint as Exhibit A. Burford's lease is improperly designated as "W. *R.* Fuller" and should be "W. L. Fuller," the same as plaintiff's and intervener's lessor.

2. Finding No. IV should be corrected by eliminating the statement that the evidence at the hearing of May 19, 1938, was cumulative of the evidence already heard at two prior hearings, and changing same to read that the evidence at that hearing was partly cumulative, but new and additional evidence was offered on points not covered by the testimony and evidence at the preceding hearings.

3. Finding No. IV should be corrected so as to state that the two other hearings on the same matter which had been held prior to the hearing on May 19, 1939, were before an examiner with no member of the Commission present.

4. Finding No. IV should be corrected so as to state, in addition to the fact that the evidence at the hearing of May 19, 1939, had not been transcribed at the time the Commission entered its order dated June 2, 1939, that the testimony offered at said hearing had neither been heard by nor read by or to the members of the Commission at the time they entered the order dated June 2, 1939.

5. Plaintiff and intervener object and except to the last sentence of Finding IV to the effect that plaintiff and intervener failed to prove that the Railroad Commission did not give proper consideration to the evidence introduced at the hearings or that they have been denied such a hearing as the law contemplates because the undisputed evidence shows that said Commission did not in a reasonable manner acquaint itself with the evidence offered at the hearings, nor perform their duty to weigh any conflicting evidence offered at said hearings, prior to entering the orders complained of, and that such orders are therefore arbitrary and void, and could not be made valid by a subsequent reading of the evidence, had the members of the Commission subsequently read same, there being no evidence that they did so in fact; that the fact that the Commission disposed of this case by considering same for a period estimated by witness Copeland to be fifteen to forty minutes, on an examiner's memorandum which was an incomplete and incorrect presentation of the case in material respects, is self-evident proof that they could not have properly and reasonably read, considered, and weighed the evidence offered at the two prior hearings, in view of the length of the transcripts and the nature of the testimony therein presented.

6. Finding No. V should be corrected by eliminating the statement therein that conditions have so changed since entry of judgment in Cause No. 54769 (the Findings erroneously refers to it as No. 54769) that such judgment is not *res adjudicata* affecting validity of the permit here involved; and should find that under the undisputed evidence there has been no material change of conditions since the entry of said judgment which would justify the granting of said permit to Burford, it being undisputed that the west 52.33 acres of the W. L. Fuller tract is as well or better protected from drainage and was more fully developed at the time the Burford permits

were granted than at the prior time when the judgment was entered in Cause No. 54769 and when the prior permit to Hammonds canceled in said suit was granted.

7. The Court is requested to find that the allegations in paragraph 3 of the Amended Complaint are true.

8. The Court is requested to find that the allegations in paragraph 4 of the Amended Complaint are true.

9. The Court is requested to find that the allegations in paragraph 5 of the Amended Complaint are true.

10. The Court is requested to find the facts on the creation of the 2.33 acres as a separate tract for development purposes, as follows: That W. L. Fuller, owner of a tract known and described as 100 acres, more or less, leased same in its entirety for oil and gas development purposes, and Mamie Hammonds, a subsequent holder of the entire lease, first assigned on December 18, 1930, the east 50 acres to persons who in turn assigned it to Magnolia Petroleum Company; that Mamie Hammonds thereafter assigned the west 50 acres to Sun Oil Company on February 28, 1931; that the Fuller tract actually contained 102.33 acres, hence after making the above mentioned assignments Mamie Hammonds still held the lease on the middle 2.33 acres, being the strip which, by mesne conveyances, was assigned thereafter to G. E. Burford and X. Y. Z. Oil & Gas Company; that the 2.33 acre tract first came into existence as a subdivided or separate tract for development purposes on February 28, 1931, at which time the spacing rule required wells to be spaced no less than 150 feet from property lines. The strip came into existence as a separate tract for development purposes when Mamie Hammonds assigned

the west 50 acres, retaining the strip, on February 28, 1931, and the strip is approximately 50 feet wide at the widest point and over 2000 feet long.

11. The Court is requested to find that the east 50 acres and the west 52.33 acres of the W. L. Fuller tract were each of such size and shape that they were capable of separate development in full compliance with the Railroad Commission's well spacing rule in existence at the time when they were created into separate tracts for development purposes, by wells located thereon at distances of 150 feet or more from their respective boundaries; that the 2.33 acre strip is of such size and shape that it is incapable of development by wells spaced thereon in compliance with the spacing rule in existence at the time it was created as a separate tract for development purposes by subdivision from the west 52.33 acres of the Fuller tract, in that the strip is so narrow that it is impossible to space wells thereon at distances of more than approximately 25 feet from its boundaries.

12. The Court is requested to find that since October 11, 1934, the date of the Mamie Hammonds permit which was canceled by final judgment in Cause No. 54769, there has been no change of conditions materially affecting the strip or the right to drill wells thereon. There have been no additional wells drilled since that date offsetting the north part of said strip on which the Mamie Hammonds well location was situated. The sand conditions in the area were the same when the Burford permit was granted as when the Hammonds permit was granted, and while the pressure in the area and in the field generally has decreased, the pressure conditions in this area continue to bear the same relation to the field generally as when the permit involved in Cause No. 54769 was granted. The Burford locations are no more necessary to be drilled than was the Hammonds location. At the date

of the Burford permits, the west 52.33 acres of the W. L. Fuller tract was as well, or better, protected from drainage and development standpoints than at the date of the Hammonds permit.

13. Plaintiff and intervener request that the Court to find that the allegations in paragraph 7 of the Amended Complaint are true.

14. The Court is requested to find that the allegations in paragraph 8 of the Amended Complaint are true.

15. The Court is requested to find that the permits involved in this suit were granted by the Railroad Commission under the exception clause "to prevent confiscation of property" and were not granted under the exception clause "to prevent waste" and that the Railroad Commission did not find that the wells in controversy are necessary to prevent waste.

16. The Court is requested to find that the undisputed evidence at the hearings before the Railroad Commission on Burford's application was to the effect that one well on the strip, under proration orders, will produce oil approximately three times as fast in proportion to underlying reserves as the adjacent portions of the Fuller tract, owned by plaintiff and intervener, and that one well will ultimately produce in excess of the recoverable oil under the 2.33 acre strip; that four wells on the strip give it a vast and undue advantage in drainage opportunity over such adjacent portions of the Fuller tract; and that such facts were also established by undisputed evidence on the trial.

17. The Court is requested to find that there was no evidence introduced at the hearings on Burford's appli-

cations for drilling permit showing that, disregarding the subdivision of the 2.33 acre strip from plaintiff's 50 acre Fuller lease, the entire area of 52.33 acres needed four additional wells, or any additional wells, or that the four locations granted would be proper locations if the west 52.33 acres of the Fuller tract needed any additional wells under either ground of exception to the spacing rule; that according to the undisputed evidence adduced on the trial, the west 52.33 acres of the Fuller tract did not need any additional wells to enable it to recover the equivalent of the recoverable oil in place thereunder, nor to protect same from drainage; that there was no testimony at the hearings before the Railroad Commission showing that the west 52.33 acres of the Fuller tract was not at that time reasonably protected by existing wells from drainage.

18. The Court is requested to find that in its motion for rehearing before the Railroad Commission, plaintiff and intervener offered to pool their respective leases with the 2.33 acre strip for development purposes in either of the following ways: (a) the 2.33 acres and plaintiff's adjoining Fuller lease, so that they may be developed as one entire tract; (b) the 2.33 acres and intervener's adjoining Fuller lease, so that they may be developed as one entire tract; (c) pool half of the strip with plaintiff's adjoining lease and half of the strip with intervener's adjoining lease: that under either of said methods the owner of the leasehold estate in the 2.33 acres would receive, without drilling any wells on the strip, his ratable share of the future production from the pooled property, in proportion to the acreage contributed by him, less deduction in the same proportion for future drilling and operating expenses occurring after the pooling is consummated; that plaintiff and intervener tendered said offer into Court so that no inequity would result from cancellation of the permits herein attacked.

19. The Court is requested to find that Burford's applications for permit were for wells Nos. 1 to 4, inclusive, on the 2.33 acre strip, not for wells Nos. 8 to 12, inclusive, on the west 52.33 acres of the Fuller tract. In other words, his applications were to drill wells on the 2.33 acres as a separate tract, and the notices of hearing issued by the Railroad Commission were sent only to the lessees adjoining the 2.33 acres, not to all the lessees adjoining the 52.33 acres. The question of whether the west 52.33 acres of the Fuller tract needed any additional wells under either ground of exception to the spacing rule was not presented to, heard, or decided by the Railroad Commission.

20. The Court is requested to find that under the Railroad Commission's proration order, each well in the area was allowed to produce 20 barrels per day, regardless of its spacing and regardless of the density of wells per acre. Four wells on 2.33 acres would give the strip an allowable equal to that enjoyed by approximately 25 acres of plaintiff's and intervener's respective leases. The Burford locations will drain large and inestimable quantities of oil from plaintiff's and intervener's respective leases, and will lessen the recovery of plaintiff and intervener, respectively, in an amount valued at at least $50,000, and plaintiff and intervener cannot present such drainage by drilling offset wells. If, in granting said Burford permit, the Railroad Commission had adjusted the allowable of the wells on the 2.33 acres in such a way that they would produce not exceeding 2.33/100ths of the total daily allowable production for the remaining and adjoining 100 acres of the Fuller tract as fixed by the Railroad Commission, such provision would have enabled G. E. Burford and his assignee, X Y Z Oil & Gas Company to produce, and only produce their fair share of the oil in place in relation to the remainder of the Fuller tract, the per-acre oil content of the 2.33 acres

being substantially the same as the average per-acre content of the remaining 100 acres of the Fuller tract, and by such an adjustment the injury to plaintiff and intervener which will result from the Burford wells on the 2.33 acres would have been materially lessened.

21. The Court is requested to find that the allegations in paragraph 13 of the Amended Complaint are true.

22. The Court is requested to find that the allegations in paragraph 14 of the Amended Complaint are true.

23. The Court is requested to find that the allegations in paragraph 15 of the Amended Complaint are true.

24. The Court is requested to find that the allegations in paragraph 16 of the Amended Complaint are true.

25. The Court is requested to find that the allegations in paragraph 9 of the Amended Complaint are true.

26. The Court is requested to find that there was no substantial evidence offered at the hearings on Burford's applications for permits supporting the permit orders herein complained of, and that same were arbitrarily entered.

27. Plaintiff and intervener object and except to Conclusion II for the reasons stated in paragraph 5 hereof and because plaintiff and intervener say the undisputed evidence establishes the facts which they request this Court to find in their favor, by paragraphs 14, 16, 18, 20, 25 and 26 hereof.

28. Plaintiff and intervener object and except to Conclusion III, because same is contrary to the law of Texas on the several points of State law raised by the pleadings and evidence and argued to the Court.

Wherefore, plaintiff and intervener pray that the Court correct and modify the Findings of Fact and Conclusions of Law and make additional findings as herein requested.

Respectfully submitted,
(S.) J. A. RAUHUT,
Attorney for Plaintiff.
(S.) GREENWOOD, MOODY & ROBERTSON,
Attorney for Intervener.

Filed May 5, 1941.

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101 ORDER OVERRULING OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW, etc.

(Title Omitted.)

This 5th day of May, A. D. 1941, came on to be considered Plaintiff's and Intervener's Objections to the Findings of Fact and Conclusions of Law and Request for Modification of Same and for Additional Findings, and being fully advised as to same, the Court is of the opinion same should be overruled;

It is Therefore Ordered that said Objections, Request for Modification and for Additional Findings be and the

same are hereby overruled, to which Plaintiff and Intervener duly except.

At San Antonic.

(S.) ROBERT J. McMILLAN,
Judge, District Court of the United States, Western District of Texas.

Entered: Civ. Or. B., Vol. 1, page 199.

Filed May 6, 1941.

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102 TRANSCRIPT OF EVIDENCE.

(Title Omitted.)

Be It Remembered that on this Wednesday, February 5, 1941, the above entitled and numbered cause came on for trial before the Honorable Robert J. McMillan, District Judge, Western District of Texas, at Austin, Texas, and continued from day to day to its conclusion; plaintiff being represented by John A. Rauhut, of Austin, Texas; the defendants G. E. Burford and X Y Z Oil & Gas Company being represented by Mr. F. L. Kuykendall, of Austin; the defendants State of Texas, Lon A. Smith, Ernest O. Thompson and G. A. Sadler, being represented by Mr. Jas. P. Hart and Mr. Edgar W. Cale, Assistants Attorney General, and the Intervener, Magnolia Petroleum Company, being represented by Mr. Dan Moody, of Austin Texas; and during said trial the following testimony was introduced and proceedings had in connection therewith:

Mr. Rauhut:

Shall we proceed, Your Honor?

The Court:
Yes, sir.

Mr. Rauhut:
First, Mr. Cale has agreed that there is a diversity of citizenship, and I would like to make sure that the other defendants likewise do.

Mr. Kuykendall:
Yes, sir.

The Court:
What do you say, Counsel for Mr. Burford?

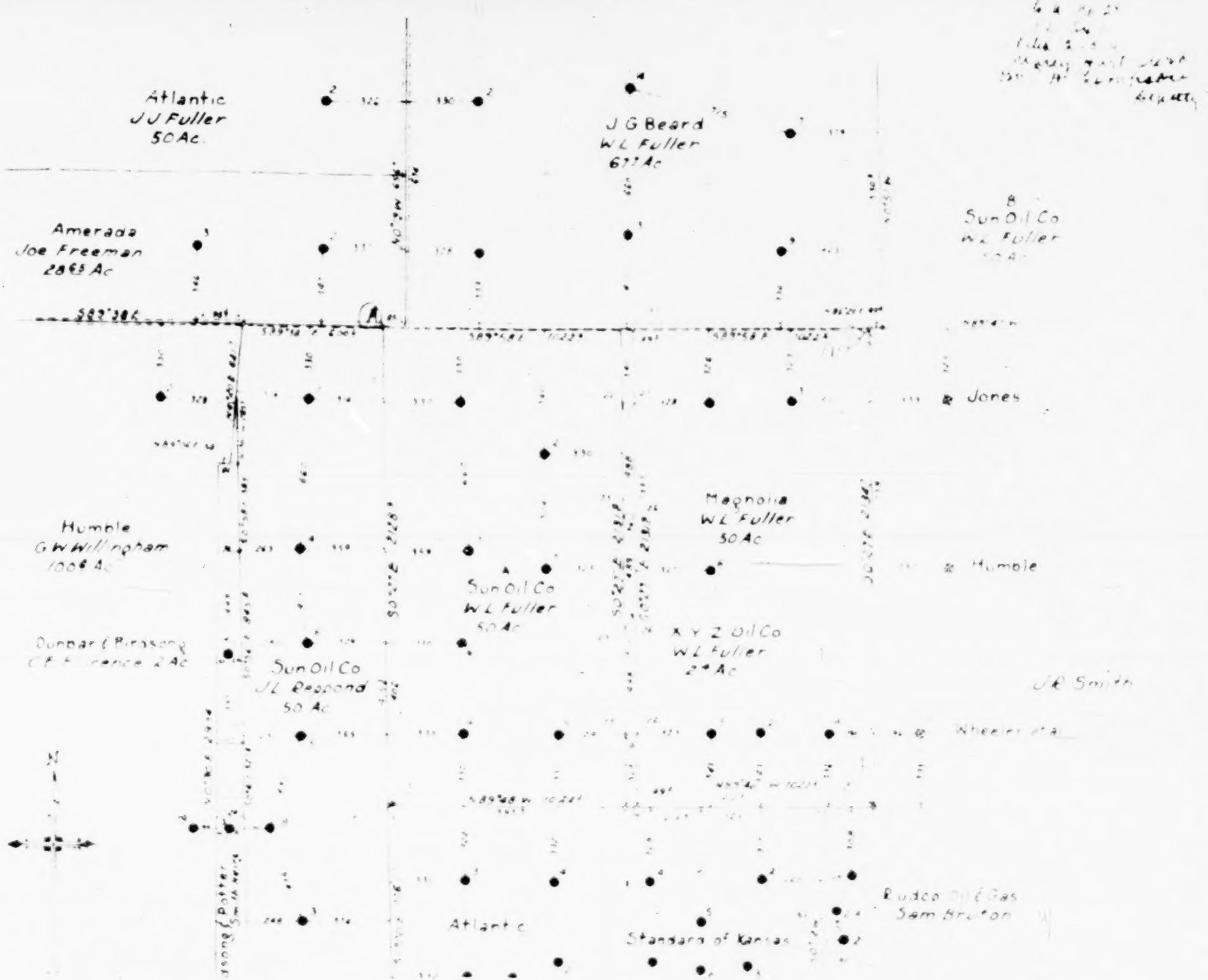
Mr. Kuykendall:
Yes, sir, we agree that there is a diversity of citizenship.

The Court:
The only question then is as to the amount in controversy.

103 PLAINTIFF'S EVIDENCE.

Mr. Rauhut:
We first offer in evidence a certified plat of this area, (it has been agreed that it may be done without further proof) showing that the conditions existing as of the date of the last hearing before the Railroad Commission, May 19, 1939.

(Thereupon the plat referred to above was marked for identification by the Reporter as Plaintiff's Exhibit No. 1, and copy of same appears at page 104 hereof.)


Atlantic
J J Fuller
50 Ac
J G Beard
W L Fuller
67.7 Ac
Amerada
Joe Freeman
28.63 Ac
Sun Oil Co
W L Fuller
50 Ac
Jones
Magnolia
W L Fuller
50 Ac
Humble
Humble
G W Willingham
100.6 Ac
Sun Oil Co
W L Fuller
50 Ac
X Y Z Oil Co
W L Fuller
2.9 Ac
Sun Oil Co
J L Redmond
50 Ac
J R Smith
Wheeler et al
Rudco Oil & Gas
Sam Bruton
Atlantic
Standard of Kansas
N

I Blair Dishman a Registered Professional Engineer, hereby certify that the above map, together with all notations, is true and correct and represents an actual survey made on the ground by me

Blair Dishman

Subscribed and sworn to before me this Ninth day of February, 1940.

Notary Public in and for Smith County, Texas

REGISTERED PROFESSIONAL ENGINEER AND LAND SURVEYOR No. 1 AUSTIN, TEXAS

MAP SHOWING

SUN OIL CO'S W L FULLER "A" LEASE
XYZ OIL CO'S W L FULLER LEASE
AND SURROUNDING AREA

AS OF MAY 19, 1939

D SANCHES SURVEY

GREGG COUNTY, TEXAS

SCALE 1 INCH = 400 FT

101

Mr. Rauhut:

Next, I want to offer in evidence a deed to W. L. Fuller, showing when he got title to the 100 acre, or the 102-1/3 acre tract that is shown on the map in the name of the Sun Oil Company, 50 acre W. L. Fuller lease and the 2-1/3 acre strip or 2 and four-tenths acre strip in the Magnolia 50 acres. This deed shows the date of November 15, 1908.

The Court:

That will be all right. Go ahead and put your proof in.

Mr. Rauhut:

All right, sir. We will substitute copies of these later.

The Court:

Yes, sir.

(Thereupon the deed referred to above was marked for identification by the Reporter as Plaintiff's Exhibit No. 2, and copy of same appears at page 105 hereof.)

105 PLAINTIFF'S EXHIBIT No. 2.

Deed.

Dated Nov 15, 1908.

Filed Jan 11, 1909.

Recorded Vol W, Page 312, Deed Records Gregg County, Texas.

W. E. Bledsoe Et Ux to Wm. L. Fuller.

The State of Texas,
County of Gregg.

Know all men by these presents; That we Willie Bledsoe and Nora Bledsoe, sole surviving heirs of J. E. Bledsoe Decd, of the County of Gregg and State of Texas

in consideration of the sum of Eight Hundred Dollars, to us in hand paid and to be paid by William L. Fuller of Gregg County, Texas, in the following manner to wit:

Two Hundred and Fifty Dollars cash in hand paid the receipt of which is hereby acknowledged and Two certain promissory notes of even date, herewith, each for the sum of Two Hundred and Seventy Five ($275.00) Dollars and due in One and Two years with interest at the rate of 8% interest from date until paid, have Granted, Sold and conveyed, and by these presents do Grant, Sell and Convey unto the said William L. Fuller of the County of Gregg and State of Texas all that certain described tract of land situated in Gregg County, Texas, a part of the Delores Sanches survey and beginning at a stake on the South line of the Alexander survey the N W corner of a 100 acre survey made for D. J. Harly from which a post oak bears S 19° W 22 varas a black jack bears N 8° W 17 varas.

Thence West at 731 varas the S W corner of M. Irwins survey and at 751-4/10 varas, a stake on the South boundary line of same.

Thence south 751-4/10 varas a stake on the West bank of a branch from which a maple bears S 77° E 7 varas. a sweet gum bears N 250° E 9 varas.

Thence E 751-4/10 varas to a large sweet gum in a branch for corner, from which a black gum bears N 8 varas.

Thence N 751-4/10 varas to the place of beginning, containing 100 acres of land.

The same being the tract of land conveyed to J. E. Bledsoe by Brown & Flewellen on the 11th day of

August 1896, and is recorded in Book O, Record of Deeds of Gregg County, Texas, on Page 590.

To have and to hold the above described premises, together with all and singular, the rights and appurtenances thereto in anywise belonging, unto the said William L. Fuller and his heirs and assigns forever.

And we do hereby bind ourselves, our heirs, executors and administrators to Warrant and Forever Defend, all and singular the said premises unto the said William L. Fuller and his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof. But it is expressly agreed and stipulated, that the vendors lien is retained against the above described note and all interest thereon are fully paid according to their face and tenor, effect and reading, when this deed shall become absolute.

Witness our hands at this 15th day of November A D 1908.

WILLIE E. BLEDSOE,
NORA E. BLEDSOE.

The State of Texas,
County of Tarrant.

Before me J. A. Leeman, Notary Public in and for Tarrant County, Texas, on this day personally appeared Willie E. Bledsoe, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office, this 8th day of Dec. A. D. 1908.

J. A. LEEMAN,
(L. S.) Notary Public, Tarrant County, Texas.

The State of Texas,
County of Navaro.

Before me B. L. Davis, a Notary Public in and for Navaro County, Texas on this day personally appeared Nora E. Bledsoe, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that she executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 19th day of Dec, 1908.

B. L. DAVIS,
(L. S.) Notary Public for Navaro County, Texas.

108 AGREEMENT.

Mr. Rauhut:

It is agreed by the parties that this deed conveyed to W. L. Fuller the land shown on Exhibit 1, totaling 102-1 3 or 1 4 acres shown on that map as Sun Oil Company's W. L. Fuller 50 acre lease, X Y Z Oil and Gas Company's W. L. Fuller 2.4 acre lease, and the Magnolia W. L. Fuller 50 acre lease.

The Court:

All right.

Mr. Rauhut:

Your Honor, I think we will stipulate something further here and I am going to state it here in the record, and they will correct me if there is anything that is incorrectly stated.

The Court:

Do you want to confer with counsel?

Mr. Rauhut:
Suppose I just dictate it to the Reporter, and then they can strike it out if it is not satisfactory.

The Court:
We will take about a five minute recess.

Mr. Rauhut:
All right, sir.

(Recess.)

The Court:
Are you ready, counsel?

Mr. Rauhut:
If the Court please, we have been making some stipulations. Would you like to have them read?

The Court:
Yes.

Mr. Rauhut:
All right.

(The following stipulation was thereupon read to the Court by the Reporter.)

109 STIPULATION.

All defendants agree to the facts alleged in Paragraph 3 of Sun Oil Company's Amended Complaint, down to but excluding the following at the end of said paragraph: "and by virtue thereof owns all the oil and gas and other minerals thereunder, subject to the payment of a one-eighth royalty on oil, and stipulated royalties on gas and

other minerals specified in its lease". However, it is agreed that plaintiff's interest under its lease is a seven-eighth interest under its lease is a seven-eighth interest in the minerals.

And it is further agreed that the 100 acres, more or less, and the west 50 and the east 50 that are referred to in that paragraph are between the corners marked "A", "B", "C", and "D" on Exhibit 1.

It is agreed by all parties that the Magnolia Petroleum Company is now the owner of a valid oil and gas lease, in the usual form, on the tract of land shown on the plat which has been introduced in evidence by the plaintiff, as Magnolia W. L. Fuller 50 acres, and that this was conveyed by the original lessee of the 102.33 acre tract to parties who conveyed it to the Magnolia Petroleum Company prior to the granting of the permit involved in this case; and it is agreed that this east 50 acres that is now under lease to the Magnolia Petroleum Company was assigned by the holder of the original lease of the 102.33 acre tract, approximately, to Bell and Graddy, who are the Magnolia's remote assignors, on December 18, 1930.

The Court:
All right, counsel.

Mr. Rauhut:
If the Court please, we desire to offer in evidence the Spacing Rule, or the original Spacing Rule of the Railroad Commission of Texas, and the amendments to the East Texas Field, showing the continuity of all the rules during all the periods that this strip was a separate tract.

The Court:
Is that Rule 37?

Mr.Rauhut:

Yes, sir. And it is agreed by all the parties, to save time, that the Reporter may copy these rules from the record in another case—that is, from the duplicate Statement of Facts in Cause No. 60,731, Humble Oil & Refining Company vs. Angue Spear et al., in the 53rd District Court of Texas. The November 26, 1919 rule is on page 110, and the East Texas amendments are copied on pages 160 through 189 of the Statement of Facts.

(Rule 37, of November 26, 1919, was received in evidence and marked for identification as Plaintiff's Exhibit No. 3,—same being here set out as follows):

111 PLAINTIFF'S EXHIBIT No. 3.

"Rule 37. No well for oil or gas shall hereafter be drilled nearer than three hundred (300) feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than one hundred and fifty (150) feet to any property line; provided that the Commission, in order to prevent waste or to protect vested rights, will grant exceptions permitting drilling within shorter distances than as above prescribed, upon application filed fully stating the facts, notice thereof having first been given to all adjacent lessees affected thereby.

Rule 37 shall not for the present be enforced within the proven oil fields of the Gulf Coast."

PLAINTIFF'S EXHIBIT No. 4.

Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Crude Petroleum Oil and Natural Gas in the East Texas Field.

Austin, Texas, September 2, 1931.

Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field Composed of Upshur, Smith, Rusk and Gregg Counties, Texas.

Whereas, the recently adjourned Special Session of the Forty-second Legislature enacted a comprehensive amendment to the oil and gas conservation laws of the State of Texas, re-defining "waste" of crude petroleum oil and natural gas and prescribing the powers of the Railroad Commission of Texas in preventing waste thereof; and

Whereas, immediately upon the adjournment of said First Called Session of the Forty-second Legislature this Railroad Commission promulgated an order directing that a special hearing should be held in the City of Austin, Texas, on the 25th day of August, 1931, to determine what field rules and regulations, if any, should be prescribed, to carry out the policies underlying the new legislation, in the so-called East Texas field, consisting of Upshur, Smith, Rusk and Gregg Counties, Texas. Pur-

suant to statutory notice, this hearing was held and evidence was offered tending to show that waste of crude petroleum oil and natural gas is now taking place or was taking place in said East Texas field as defined herein prior to and at the time of the shut-down of said field on or about the 17th day of August, 1931, and that waste of said oil and gas is threatened in said East Texas field in the respects hereinafter prescribed will prevent or tend to lessen the waste of said oil and gas in said field.

In the recently enacted legislation the Legislature of Texas has provided that waste shall not be construed to mean "economic waste"; and further that the Railroad Commission of Texas "shall not have power to attempt by order or otherwise directly or indirectly, to limit the production of oil to equal the existing market demand for oil". In view of this legislative mandate the Railroad Commission has deemed it improper to consider any evidence at the hearing which convened on August 25, 1931, and was concluded on August 28, 1931, dealing with economic conditions in and oil industry. Accordingly, at the hearing mentioned no evidence was heard or considered dealing with price or with the limitation of production with a view of stabilizing or raising the price of crude petroleum oil.

On consideration of all of the evidence adduced at said hearing the Railroad Commission of Texas is of the Opinion and so Finds and Orders that the following rules and regulations are reasonable and necessary and will prevent, or greatly minimize, the waste of crude petroleum oil and natural gas in the East Texas field.

1. That present producing areas and extensions thereof in the counties of Gregg, Upshur, Smith and Rusk, Texas, shall constitute and be known as the "East Texas field".

2. It appearing from the evidence that the spacing of wells in said East Texas field, under the terms and provisions of the Railroad Commission's oil and gas conservation Rule 37 threatens to cause actual physical waste due to the too rapid dissipation of gas energy in the production of oil and also due to the too rapid encroachment of water, that in the interest of preventing actual physical waste of oil and gas in said East Texas field, it is desirable to modify said Rule 37 as applied to said field. Therefore, it is here now ordered by the Railroad Commission that said Rule 37, insofar as it applies to the East Texas field, be modified and the following rule is provided: "No well for oil or gas shall hereafter be drilled nearer than 660 feet to any other completed or drilling well on the same or adjoining tracts of land and no well shall be drilled nearer than 330 feet to any property line; provided, that the Commission, in order to prevent waste and to protect vested rights, shall and will grant exceptions permitting drilling within shorter distance as above described upon application filed duly stating the facts, statutory notice thereof having first been given to all adjacent lessees or operators thereof; and provided further that this modification of Rule 37 shall not be applied against wells already begun or offsets thereto". It is not the intention of the Railroad Commission to repeal Rule 37 by this order, but only to provide a special rule applicable only in said East Texas field.

114 PLAINTIFF'S EXHIBIT No. 4-A.

Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field.

Austin, Texas, September 10, 1931.

Supplemental Order Amending Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field Composed of Upshur, Smith, Rusk and Gregg Counties, Texas.

Whereas, the Railroad Commission of Texas on September 2, 1931, adopted an order promulgating rules and regulations for the prevention of physical waste of crude petroleum oil and natural gas in what is known as the East Texas field composed of Upshur, Smith, Rusk and Gregg Counties, Texas, and among other rules adopted for that purpose was the modification of Rule 37 limiting the spacing of wells in said field; and

Whereas, it appears to said Commission that said rule should be further modified as a safeguard against physical waste due to the too rapid dissipation of gas energy in the production of oil in said field, and also to the rapid encroachment of water;

Therefore, It Is Hereby Ordered by the Railroad Commission of Texas that paragraph numbered two of said order of September 2, 1931, relating to the modification of Rule 37 be and the same is hereby amended by the addition of the following requirement:

After 12:01 P. M. Tuesday, September 15, 1931, not more than one well to each twenty (20) acres of surface ownership shall be drilled in said field and for the purpose of enforcing this order the deputy supervisor in charge of said field shall divide the same into 20-acre tracts and in doing so shall make such subdivision in such manner that the said 20-acre tracts shall not have length in excess of twice the width thereof. Such 20-acre tracts shall be known as units, and parts thereof shall be known as fractional units. No lease or property shall be divided in such manner as to create more than one fractional unit, and units and fractional units shall be calculated upon the basis of ownership as of the date hereof. New productive areas shall be divided into units and fractional units as the field may be extended. Fractional units shall be created only in case there shall be insufficient acreage in the lease or property of which the fractional unit is a part to create a full unit. Noncontiguous leases or properties shall be treated as separate tracts for the purpose of forming units and fractional units. For the purpose of the limitation of drilling described herein, each fractional unit shall be considered a full unit. The distances covering the spacing of wells provided for in the modification of Rule 37 as amended for the purpose of application in said field shall be considered minima, subject, however, to the granting of exception as provided for in this paragraph as originally adopted.

The limitation of one well to each full unit or fractional unit as provided for herein shall not apply to units

where more than one well has already been begun or where there are offset wells already begun or completed.

(Seal) RAILROAD COMMISSION OF TEXAS.
By C. V. TERRELL,
Chairman.
LON A. SMITH,
Member.
PAT M. NEFF,
Member.

Attest:
C. F. PETET,
Secretary.

116 PLAINTIFF'S EXHIBIT No. 4-B.

Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Oil and Natural Gas in the East Texas Field in Upshur, Gregg, Rusk and Smith Counties, Texas.

Austin, Texas, February 25, 1932.

Special Order Adopting Rules and Regulations Pursuant to Hearing February 12, 1932.

Pursuant to statutory notice, the Railroad Commission of Texas, hereafter referred to as the "Commission",

reopened the above cause on February 12, 1932, for the purpose of considering the adoption of rules and regulations for the prevention of waste of crude oil and natural gas in the East Texas field, composed of the producing areas and extensions thereof in Upshur, Gregg, Rusk and Smith Counties, Texas, and for the further purpose of adopting rules and regulations pertaining to the Common Carrier and Common Purchaser Laws of the State relating to crude oil and natural gas.

A similar hearing was held in said cause August 25, 1931, for the same purpose and an order was duly entered by the Commission September 2, 1931, adopting regulations for the spacing, completion and operation of wells in such manner as to prevent waste, for the establishment of a limit in the amount of oil and gas which might be produced from said field and the maximum ratio of oil to gas produced from any well therein, and for the purpose of conserving the gas energy in the field. The regulations were further designed to provide for the most efficient utilization of the water drive or hydrostatic pressure arising from the approach of water from the west side of the field, and to increase the ultimate recovery of oil from the producing sands. At the time of the hearing of August 25, 1931, engineers and operators in the field were not in possession of such complete data on the field as would enable them to bring to the Commission conclusive testimony as to what should be done with that degree of exactness experience with the field would suggest, but sufficient evidence was introduced to guide us in establishing regulations for the conduct of operations in the field in an orderly way which would conserve the oil and gas therein and we verily believe that the orders entered September 2, 1931, and at later dates, without doubt, served that useful purpose, and though perhaps not perfect, they were a material improvement over past operations when

the field was out of control. The evidence which formed the basis of those orders will be considered here and the findings of our order of September 2, 1931, as to the necessity for spacing and tubing of wells, limiting the penetration of the producing horizons, plugging back for salt water, the prevention of fire hazards, and the like, where appropriate, are here adopted for this order.

Since the hearing of our August 25, 1931, it is evident from the testimony taken at our recent hearing and from reports of our own agents, that much valuable information as to pressures, pressure declines, oil-gas ratios, the movement of the water table, and other engineering data has been accumulated and compiled so that the engineers were enabled to testify with more assurance and more conclusively at our hearing of February 12, 1932, as to what is going on underground in said field. From the testimony at that hearing, it appears clearly evident,—(a) that withdrawal of oil in the past has been too rapid as the mean bottom hole pressure has dropped from 1600 to about 1425, or approximately two pounds for every million barrels of oil produced, whereas under the orderly conservation program of production, under this Commission's orders, in the Yates Field in Pecos County, the decline in pressure has been, by comparison, during the past year about twenty-one pounds per square inch or six-tenths of one pound for each million barrels of oil produced; (b) that the reservoir energy of the East Texas Field has been dissipated at an excessive rate due to excessive and disproportionate withdrawals of oil from the field; (c) that reservoir pressures have not been maintained as effectively as they should be in order to prevent liberation of "free gas" and consequent high oil-gas ratios and resulting gas water; (d) that the two lifting agencies (gas energy and water drive) have not been properly conserved and coordinated, and in said field

there is a notable deficiency of gas, which fact demands not only the most effective plan of orderly production of oil to conserve gas energy but a proper use of the water drive by withdrawals of oil at such slow rates and under such conditions as will permit the water to come in and gradually and effectually displace the oil; (e) that the maximum ultimate recovery of oil per acre of the field has not been but can be attained only by the maintenance of an orderly, gradual oil production rate; (f) that maximum daily production should be limited to slightly in excess of three hundred thousand (300,000) barrels as a maximum, but that water intrusion or actual physical waste would be greatly minimized at a production rate for said field below three hundred thousand (300,000) barrels per day, such low rates being necessary for the orderly encroachment of water and consequent maximum ultimate yield of oil.

On careful consideration of all the evidence adduced at the hearings in this cause held on August 25, 1931, and February 12, 1932, before the Railroad Commission of Texas, the said Railroad Commission is of the opinion and so Finds and Orders that the following rules and regulations are reasonable and essential to the conservation of oil and gas and the prevention of physical waste thereof in the said East Texas Field, and that they will prevent, or greatly minimize, the waste of crude petroleum oil and natural gas, and will correct the unsatisfactory and wasteful condition hereinbefore referred to.

Rule 1. (a) Rule 37, adopted November 26, 1919, is hereby amended insofar as it applies to the East Texas Field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than Six Hundred and Sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled

for oil or gas at any point less than Three hundred and Thirty (330) feet from any property or division line; provided, however, the Commission, in order to prevent waste or to protect vested rights, will, after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing, notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing."

(b) Any owner or owners of an oil, gas or mineral lease, covering a tract or tracts of land of the same fee title of Twenty (20) acres or less, shall not drill more than one (1) well for oil or gas on said tract or tracts of land, and such well shall be properly spaced according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof or to meet forced offsets.

(c) Any owner or owners of an oil, gas or mineral lease, covering a tract or tracts of land of the same fee title of Twenty (20) acres or more, shall not drill more than one (1) well for oil or gas on each Twenty (20) acre part or unit thereof and such well shall be properly spaced, according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof, and to meet forced offsets. Each tract shall, however, not contain more than one (1) fractional unit and the division of each such tract into units may be made by the owner thereof, subject to the approval of the Commission. When the equivalent of one (1) well for every unit or fractional unit has been permitted on each such tract of land regardless of the location of the wells on

such tract, no additional wells shall be allowed on undrilled units unless and until forced by offsets.

121 PLAINTIFF'S EXHIBIT No. 4-C.

Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Oil and Natural Gas in the East Texas Field in Upshur, Gregg, Rusk, Smith and Cherokee Counties, Texas.

Austin, Texas, April 30, 1932.

Order Amending Rules and Regulations Adopted February 25, 1932.

In accordance with notice duly given in above cause, the Railroad Commission of Texas held a hearing at Austin, Texas, on April 28, 1932, and on previous dates which hearings produced testimony which formed the basis for previous orders adopting rules and regulations for the conservation of oil and gas and the prevention of waste in the East Texas Field, including the producing areas in Rusk, Gregg, Smith and Upshur Counties and the extensions thereof which now include Cherokee County; and

It Appearing from the testimony adduced at said hearings that all rules and regulations heretofore adopted by order of the Commission dated February 25, 1932, should be continued in effect, except as hereinafter provided by amendment to certain rules; and also that certain ad-

ditional rules hereinafter specified should be adopted for the prevention of waste in said field; and

It Appearing that such amendments and such newly adopted rules will serve to prevent or minimize waste in said field and promote the orderly production of crude oil and natural gas therein and tend to conserve these natural resources;

Therefore, It Is Ordered by the Railroad Commission of Texas that its order of February 25, 1932, be and the same is hereby readopted except as amended in the following particulars:

Rule 1. (a) Rule 37, adopted November 25, 1919, is hereby amended insofar as it applies to the East Texas Field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than 660 feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than 330 feet from any property or division line; provided, however, the Commission in order to prevent waste or to protect vested rights will after hearing grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing, notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing."

(b) Any owner or owners of an oil, gas or mineral lease, covering a tract or tracts of land of the same fee of twenty acres, or less, as of February 25, 1932, shall not drill more than one well for oil or gas on

said tract or tracts of land and such wells shall be property space according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof or to meet forced offsets.

(c) Any owner or owners of an oil, gas or mineral lease, covering a tract or tracts of land of the same fee title of twenty acres or more, as of February 25, 1932, shall not drill more than one well for oil or gas on each twenty acre part or unit thereof and such wells shall be properly spaced, according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof and to meet forced offsets. Each tract, however, shall not contain more than one fractional unit and the division of each such tract into units may be made by the owner thereof subject to the approval of the Commission. When the equivalent of one well for every unit or fractional unit has been permitted on each such tract of land regardless of the location of the wells on such tract no additional wells shall be allowed on undriled units unless and until forced by offsets.

124 PLAINTIFF'S EXHIBIT No. 4-D.

"Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Oil and Natural Gas in the East Texas Field in Upshur, Gregg, Rusk, Smith and Cherokee Counties, Texas.

Austin, Texas, June 30, 1932.

Order Amending Rules and Regulations Governing Said Field.

In accordance with notice duly given in the above cause, the Railroad Commission of Texas held a hearing

at Austin, Texas, on June 21st and 22nd, 1932, for the purpose of considering the amendment or continuation of presently existing rules, regulations or orders for the prevention of waste of crude oil and natural gas in said field, including the producing areas in Rusk, Gregg, Smith, Upshur and Cherokee Counties or extensions of such areas wherever located; and

It Appearing from the testimony adduced at said hearings that all rules and regulations and orders heretofore adopted by orders of the Commission dated February 25, 1932, April 30, 1932, and May 28, 1932, should be continued in effect except as hereinafter provided by amendment to certain rules; and

It Appearing that such amendments to previously adopted rules will serve to prevent or minimize waste in said field and promote the orderly production of crude oil and natural gas therein and tend to conserve these natural resources.

Therefore, It Is Ordered by the Railroad Commission of Texas that its orders of February 25, 1932, April 30, 1932, and May 28, 1932, be and the same are hereby readopted except as amended in the following particulars:

Rule 1. (a) Rule 37, adopted November 26, 1919, is hereby amended insofar as it applies to the East Texas Field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than Six Hundred and Sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than Three Hundred and Thirty (330) feet from any property or division line; provided, however, the Commission, in order to prevent waste or to protect vested rights, will, after hearing, grant exceptions permitting drilling within a less or shorter dis-

tance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing."

(b) Any owner or owners of oil, gas or mineral lease, covering a tract or tracts of land of the same fee title of Twenty (20) acres or less, as of February 25, 1932, shall not drill more than one (1) well for oil or gas on said tract or tracts of land, and such well shall be propery spaced according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof or to meet forced offsets.

(c) Any owner or owners of an oil, gas or mineral lease, covering a tract or tracts of land of the same fee title of Twenty (20) acres or more, as of February 25, 1932, shall not drill more than one (1) well for oil or gas on each Twenty (20) acre part or unit thereof and such well shall be properly spaced, according to Section (a) hereof. Exceptions may be granted as in Section (a) hereof, and to meet forced offsets. Each tract shall, however, not contain more than one (1) fractional unit and the division of each such tract into units may be made by the owner thereof, subject to the approval of the Commission.

(d) Any operator having a lease or tract of land with 20 acre undrilled units thereon or an undrilled fractional unit, meeting the requirements of the foregoing provisions of Rule 1 herein, may drill not to exceed one well on each undrilled 20 acre unit or fractional unit, spaced not less than 330 feet to any offset lease line

and not less than 660 feet to any other drilling or producing well on the same or adjoining tract, and any such well will be accepted by the Railroad Commission as a regular location, not requiring a special permit, provided that each time an operator desires to drill a well under this provision, such operator will submit a plat showing the division of the tract of land into units and, in addition to the proposed location, the location of all wells surrounding the 20 acre unit on which the well is to be drilled.

127 PLAINTIFF'S EXHIBIT No. 4-E.

"Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field.

Austin, Texas, January 31, 1933.

Supplemental Order Amending Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field Composed of Upshur, Smith, Rusk, Gregg and Cherokee Counties, Texas.

Whereas, the Railroad Commission of Texas, on February 25, 1932, adopted an order promulgating rules and regulations for the prevention of physical waste of crude

petroleum oil and natural gas in what is known as the East Texas field composed of Upshur, Smith, Rusk, Gregg and Cherokee Counties, Texas, and among other rules adopted for that purpose was the amendment of Rule 37 limiting the spacing of wells in said field, which amendment has been continuously kept in effect by subsequent orders; and

Whereas, it appears to said Commission that from evidence adduced at the East Texas hearing held in Austin, December 28 to 31, 1932, inclusive, said rule should be further amended, in order that properties might be more carefully developed so as to insure a maximum oil recovery;

Therefore, It Is Hereby Ordered by the Railroad Commission of Texas that, effective as of the date hereof, Rule 1, Section (a) of said order of February 25, 1932, relating to the modification of Rule 37 be and the same is hereby amended so as to hereafter read as follows:

Rule 1. (a) Rule 37, adopted November 26, 1919, is hereby amended insofar as it applies to the East Texas field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than six hundred and sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than three hundred and thirty (330) feet from any property or division line; provided, however, the Commission in order to prevent waste or to protect vested rights, will, after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing, notice of hear-

ing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing; and, provided further that in cases of forced offsets the Commission may grant exceptions without waivers or hearing when it is evident that the wells desired are necessary to protect the properties on which it is proposed to drill them."

Section (b) and (c) of said order of February 25, 1932, and any or all other orders relating to spacing of wells on twenty (20) acre units and fractional units in said East Texas Field are hereby canceled.

129 PLAINTIFF'S EXHIBIT No. 4-F.

"Railroad Commission of Texas.

Oil and Gas Division.

Oil and Gas Docket No. 120.

In Re: Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the East Texas Field.

Austin, Texas, June 13, 1933.

Supplemental Order Amending Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field Composed of Upshur, Smith, Rusk, Gregg and Cherokee Counties, Texas.

It appearing to the Commission from evidence adduced at the East Texas hearing held in Austin on June 12,

1933, that Rule 37, limiting the spacing of wells in the East Texas field, including Upshur, Smith, Rusk, Gregg and Cherokee Counties, should be amended in order that properties might be more fully developed so as to insure a maximum oil recovery and to allow owners of various properties in said fields to protect themselves against inequities which might result from a strict enforcement of said Rule 37;

Therefore, It Is Hereby Ordered by the Railroad Commission of Texas that, effective as of the date hereof, Rule 1, Section (a) of the order of January 31, 1933, of the Railroad Commission, modifying and readopting Rule 37 be and the same is hereby amended so as to hereafter read as follows:

Rule 1. (a) Rule 37, adopted November 26, 1919, is hereby amended insofar as it applies to the East Texas Field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than six hundred and sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than three hundred and thirty (330) feet from any property or division line; provided, however, the Commission in order to prevent waste, or to protect vested rights, or to protect any property against undue drainage by reason of the operation of the wells of any other operator, will after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove described, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing, notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing; and, provided, further, that

in cases of forced offsets the Commission may grant exceptions without waivers of hearing when it is evident that the wells desired are necessary to protect the properties on which it is proposed to drill them."

131 PLAINTIFF'S EXHIBIT No. 4-G.

"Railroad Commission of Texas.
Oil and Gas Division.

Oil and Gas Docket Nos. 108, 120, 123, 124, 125, 126, 128, 129 and 132.

In Re: Conservation and Prevention of Waste of Crude Petroleum Oil and Natural Gas in the State of Texas and Particularly in the Fields and Counties Hereinafter Mentioned.

Austin, Texas, Oct. 17, 1933.

Supplemental Order Amending Special Order Fixing Rules and Regulations for the Prevention of Physical Waste of Crude Petroleum Oil and Natural Gas in What is Known as the East Texas Field Composed of Upshur, Smith, Rusk, Gregg and Cherokee Counties, Texas.

Division II. Drilling.

Rule 1. (a) Rule 37, adopted November 26, 1919, is hereby amended insofar as it applies to the East Texas field so as to hereafter read as follows: "No well shall hereafter be drilled for oil or gas at any point less than six hundred and sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for

oil or gas at any point less than three hundred and thirty (330) feet from any property or division line; provided, however, the Commission in order to prevent waste, or to protect vested rights, or to protect any property against undue drainage by reason of the operation of the wells of any other operator, will after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing, notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing; and, provided, further, that in cases of forced offsets the Commission may grant exceptions without waivers of hearing when it is evident that the wells desired are necessary to protect the properties on which it is proposed to drill them."

132 PLAINTIFF'S EXHIBIT No. 4-H.

(Excerpt from Oil and Gas Conservation Rules and Regulations. Oil and Gas Circular No. 16-B, issued by Railroad Commission on May 15, 1934, being under II—Drilling, as found on pages 57 and 58, of said circular.)

II. Drilling: Rule 1. Rule 37, adopted November 26, 1919, is hereby amended in so far as it applies to the East Texas Field so as to hereafter read as follows: No well for oil or gas shall hereafter be drilled in said East Texas Field nearer than 660 feet to any other completed or drilling well on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line, or subdivision line; provided that the Commission in order to

prevent waste or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equalling four hundred feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule, and accurately showing to scale all other completed drilling and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten days' notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard and after the Commission has determined that an exception to such rule is necessary to either prevent waste or to protect the property belonging to applicant from confiscation. All pending applications shall be amended to conform to the rule before being acted upon.

No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule, and no well drilled under such a special permit which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas; and any such well so drilled in violation of said rule

or in violation of permit granted as a special exception to said rule shall be plugged.

The order entered by this Commission on August 30, 1933, commonly designated as the direct and equidistant offset order is hereby rescinded, annulled and shall be of no further force and effect. All other rules, regulations and orders of this Commission which conflict with the terms and provisions of Rule No. 1 as hereby amended and promulgated is hereby declared to have no further application to wells in said East Texas Field to the extent of such conflict.

In the adoption and promulgation of this order it is here declared that the Commission intends to adopt each phrase, sentence, and paragraph separately and independently of each other such phrase, sentence and paragraph, and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion.

(Adopted May 29, 1934.)

Mr. Rauhut:

I next desire to offer, unless it can be stipulated, the chain of assignments of oil and gas leases from Mamie Hammonds on the strip involved in this case, down into G. E. Burford, and also into the X Y Z Oil and Gas Company. Do you care to stipulate these?

Mr. Kuykendall:

We would like to see what they are, first.

The Court:

Why don't you agree, after you look at them, that they are all right—that you will stipulate it?

Mr. Cale:
Yes; we have no desire to—

The Court:
You can do that during the recess period.

Mr. Cale:
Yes, sir, if they will just agree that Burford owns the title to this tract it might eliminate some of these things, as far as the Railroad Commission is concerned.

Mr. Kuykendall:
X Y Z Oil and Gas Company succeeded to all the rights Burford had.

Mr. Rauhut:
The date on these have some importance, and we can make a short stipulation, if they are willing to stipulate.

The Court:
All right; you can do that during the recess period.

Mr. Rauhut:
I next desire to offer in evidence the application of G. E. Burford for permit to drill wells 1, 2, 3 and 4 on this tract or strip designated as W. L. Fuller 2.33 acres, consisting of what is called a Form 1 and a plat filed in the Oil & Gas Division of the Railroad Commission June 18, 1938. This is a certified copy.

(Thereupon the Application and plat referred to above were marked for identification as Plaintiff's Exhibits No. 5 and No. 5-A, respectively,--same being here set out as follows):

136 PLAINTIFF'S EXHIBIT No. 5.

Please Refer to File No. .....

Form 1.

Railroad Commission of Texas—Oil and Gas Division, Austin, Texas.

Important Notice: This is the first record the Railroad Commission has of any well. It is made the basis of all subsequent correspondence. Hence It Must Be Correct.

Notice of Intention to Drill or Deepen.

(Use Form 2-A for Notice of Intention to Plug).

(To comply with Rules of the Railroad Commission of Texas governing Oil and Gas Conservation in Texas.)

Read Carefully and Comply Fully.

In order that it may be ascertained whether or not the proposed location covered by this notice conforms to the applicable spacing regulations set down by the Railroad Commission, there are two important footages that must be shown; that is, The Nearest Distance Of Proposed Location From Lease Or Property Line And Distance Of Proposed Location From The Nearest Well On The Same Lease. Do not begin operation on any location before filing Form 1, and do not begin operations on any location not conforming to the spacing rules for such location until you receive written order from the commission granting permission.

For the purpose of this determination draw on the back side hereof a neat, accurate sketch, made to scale, of

this lease, block, or lot locating thereon the proposed site for this location with reference to the two nearest lease lines. Also show the nearest wells on all sides of this location and the distances from the proposed location to those wells. Give names and addresses of adjoining lease or property owners, and designate all property by lease and company name. You may attach a blue print showing this information if you so desire.

Do Not Confuse Survey Lines With Lease Lines. If The Sketch Or Blue Print Shows Only A Section, Block, Or Lot Out Of Your Lease, Designate Same As Being Only That Part Of The Lease.

Where the size of the tract will permit, use scale of one inch equaling 400 feet; if less than 2 acres use scale of one inch equaling 100 feet. Designate Scale To Which Plat Or Sketch Is Drawn. Also Designate Northerly Direction On The Sketch Or Plat.

Fill In Below In The Spaces Reserved For This Purpose The Footages Asked For:

Nearest distance from proposed location to property or lease line 23 feet.

Distance from proposed location to nearest drilling, completed, or applied for well on same lease feet.

Draw Sketch Above Referred To On Reverse Side Hereof Or Attach To This Notice A Blue Print Showing This Information.

(On Margin) 2 P. M. Aug. 15.

This notice must be delivered to Deputy Supervisor of your district before drilling, or deepening. He will forward to the Railroad Commission, Austin, Texas.

Date June 17, 1938.

Name of company or operator:
Name G. E. Burford.
Address 1303 Tower Petroleum Bldg.
City Dallas, Texas.
(Notify Harry S. Pollards, 615 Norwood Bldg., Austin.)

Description of farm or lease:
Name (Fee owner) W. L. Fuller.
Number of Acres 2.33. Wells No. 1, 2, 3, & 4.
Survey Sanches.
Section No. ..... Block No. .....
Located in East Texas, Field, Gregg County, Five Miles East direction from Gladewater nearest postoffice or town.

Rotary or Cable Tools: Rotary.
Date work will start drilling: At Once.
Depth to which you propose to drill: 3700 feet.
Date work will start deepening:
If Lease Purchased with one or more wells drilled from Whom Purchased?

Name .....
Address .....

(Stamped) Received Austin Jun 18 1938 Oil & Gas Division.

Deliver to Deputy Supervisor in Charge of District in Which Well Is Located.

Rule 37. Spacing Rule—(Applies to all fields in the State except where special field rules govern)—No well for oil or gas shall hereafter be drilled nearer than 300 feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than 150 feet to any property line, lease line, or sub-division line; provided that the Commission

in order to prevent waste or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distance than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired, application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equaling 400 feet, accurately showing to scale the property on which permit is sought, to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten days notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect the property belonging to applicant from confiscation. All pending applications shall be amended to conform to this rule before being acted upon. Upon similar application and showing the Commission may grant exceptions to the application of this rule in fields where the production is obtained from a formation which is known to be segmented by piercement of intrusive salt plugs.

"In the interest of protecting life and property and for other just and reasonable causes the Commission reserves the right in particular fields to enter special orders increasing the minimum distances provided by this rule.

"No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule and no well drilled under such a special permit, which does not conform to the terms of such special permit in all respects shall be permitted to produce either oil or gas and any such well so drilled in violation of said rule or in violation of a permit granted under an exception to such rule shall be plugged."

Notice: Before Sending In This Form Be Sure That You Have Given All Information Requested. Much Unnecessary Correspondence Will Thus Be Avoided.

(Written) denied 25562—C. C. Cammack—3/17/38.

(Mr. H. Pollard has file.)

State of Texas,
County of Travis.

I, C. F. Petet, Secretary of the Railroad Commission of the State of Texas, do hereby certify that the attached instrument, described as follows:

Photostatic copy of Notice of Intention to Drill

(Form 1) filed by G. E. Burford to drill wells Nos. 1, 2, 3 and 4 W. L. Fuller 2.33 acre tract in the Sanchez Survey, in Gregg County, Texas, Dated June 17, 1938, with plat covering same attached.

is a true and correct copy of the original instrument now on file in the Railroad Commission, and in my custody as Secretary and Custodian of the files of the Railroad Commission.

Witness my hand and seal of the Railroad Commission of Texas, this the 17th. day of February, 1940.

(Signed) C. F. PETET,
(C. F. Petet)
Secretary.

PLAINTIFF'S EXHIBIT NO. 5-A.

I, PATRICK TYRE, an Engineer employed by HUDNALL & PIRTLE, Tyler, Texas do hereby certify that this plat truly and correctly shows the locations of the wells as found in a survey by me on the ground on Jan. 26 A. D. 1938. Patrick Tyre

Subscribed and Sworn before me, a Notary Public, on this 9 day of June A. D. 1938.

Notary Public in and for Smith County Texas

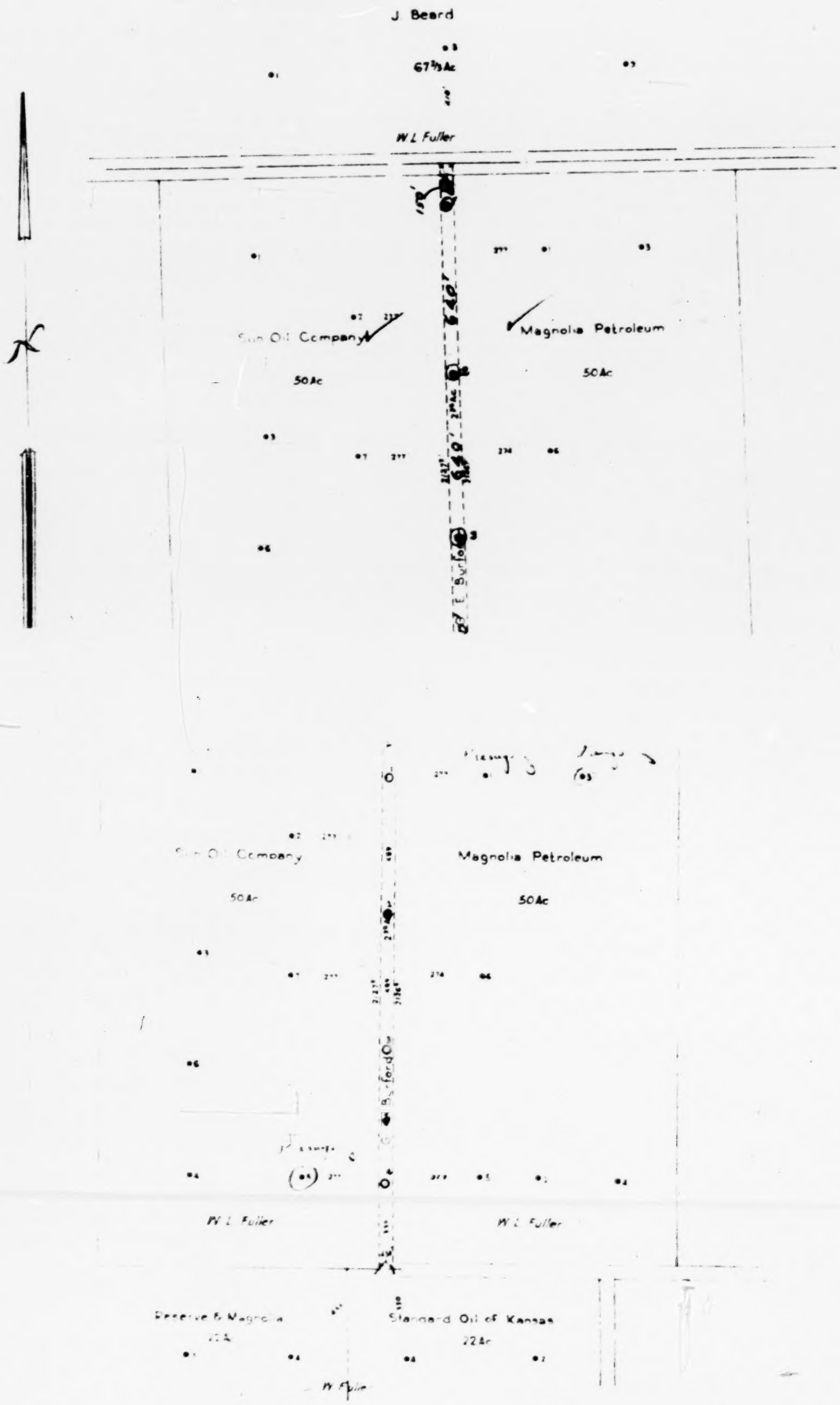
PLANE TABLE PLAT

G. E. Burford – W. L. Fuller

D. SANCHES SUR GREGG CO. TEXAS

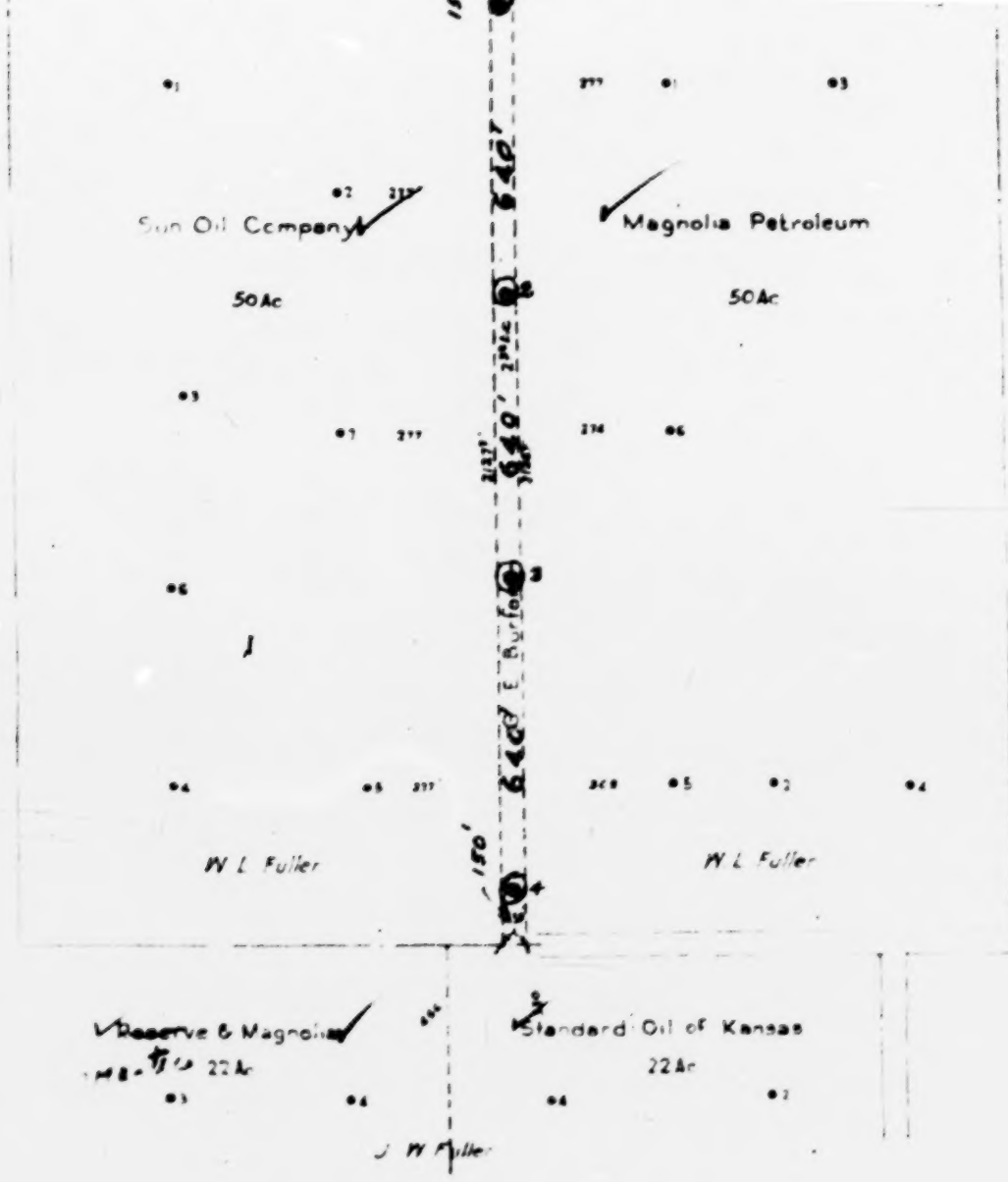
SCALE: 1"-400 JAN. 26, 1938

Hudnall & Pirtle



I, Patrick Tyre, a licensed land surveyor do hereby certify that this plat is the result of a survey made by me on the ground and that it is correct to the best of my knowledge and belief. Distances are scaled from original field sheet and loose dimensions are from the survey.

Patrick Tyre
LICENSED LAND SURVEYOR



I, A P Lyle, a licensed land surveyor do hereby certify that this plat is the result of a survey made by me on the ground, and that it is correct with the practical limits of the method employed. Distances are scaled from original field sheet and lease dimensions from chain survey.

A P Lyle
LICENSED LAND SURVEYOR

Plaintiff's Ex. No. 5-A

Mr. Rauhut:

I next offer in evidence the notice of hearing issued by the Railroad Commission on that application,—calling a hearing for August 15, 1938, and call attention to the fact that this notice was issued only to those owners that are shown on that map, and the attorneys in the case, I believe, were also included.

(Thereupon the Notice of Hearing referred to above was marked for identification as Plaintiff's Exhibit No. 6,—same being here set out as follows):

143 PLAINTIFF'S EXHIBIT No. 6.

August 1, 1938.

G. E. Burford, c/o C. C. Cammack, 1303 Tower Petroleum Bldg., Dallas, Texas; Harry Pollard, G. Griffin, Dillard Estey, Standard Oil Co. of Kansas, Box #256, Houston, Texas, protests.

Magnolia Petroleum Co., Dallas, Texas; J. B. Robertson, J. G. Beard, Duncan, Okla.; S. W. Ketchen.

Sun Oil Co., Dallas, Texas; C. B. Jeffrey, D. M. Collingwood, C. B. Jeffrey, Littlefield Bldg., Austin, Texas.

The Atlantic Refining Co., c/o H. C. Renz, Box #2819, Dallas, Texas; J. W. Stayton, Harry Pollard, 615 Norwood Bldg., Austin, Texas.

Gentlemen:

Please accept this as a notice of hearing covering the application of G. E. Burford for a special permit to drill wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33

acre tract in the Sanchez Survey in Gregg County, Texas.

Location desired is as follows:

No. 1: 150′ S. of the N. Line Midway from E. and W. Line.

No. 2: 640′ S. of No. 1 location Midway from E. and W. line.

No. 3: 640′ S of No. 2 location Midway from E. and W line.

No. 4: 150′ N. of S. line. 640′ S. of N. 3 location. Midway from E. and W. line.

Hearing will be held in the offices of the Railroad Commission in Austin, Texas, at 2:00 p. m., August 15, 1938.

Yours very truly,

zk.,

(Notation).

Denied Case 4942 to S. M. Dunbar 11/23/31.

Denied Case 10032 to J. L. Meek 8/4/33 (½ of strip).

Denied Case 10033 to Lester White 8/4/33 (½ of strip).

Denied Case 10856 to Mamie Hammond 11/7/33.

Denied Case 25562 to C. C. Cammack 3/12/38.

State of Texas,
County of Travis.

I, C. F. Petet, Secretary of the Railroad Commission of the State of Texas, do hereby certify that the attached instrument, described as follows:

Photostatic copy of carbon copy of Notice of Hearing covering application of G. E. Burford for a special permit to drill wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33 acre tract in the Sanchez Survey in Gregg County, Texas.

Said hearing to be held on August 15, 1938.

is a true and correct copy of the original instrument now on file in the Railroad Commission, and in my custody as Secretary and Custodian of the files of the Railroad Commission.

Witness my hand and seal of the Railroad Commission of Texas, this the 17th. day of February, 1940.

(Signed) C. F. PETET,
(C. F. Petet)
Secretary.

Mr. Rauhut:

We next offer in evidence the application of G. E. Burford for permit to drill wells 1, 2, 3, and 4 on W. L. Fuller 2.33 acres, consisting of what is called a Form 1 and a plat,—filed in the Oil & Gas Division of the Railroad Commission on January 9, 1939.

(Thereupon the Application and Plat referred to above were marked for identification as Plaintiff's Exhibits No. 7 and No. 7-A, respectively,—same being here set out as follows):

145 PLAINTIFF'S EXHIBIT No. 7.

Please Refer to File No. .....

Form 1.

Railroad Commission of Texas, Oil and Gas Division, Austin, Texas.

Important Notice: This is the first record the Railroad Commission has of any well. It is made the basis of all subsequent correspondence. Hence It Must Be Correct.

Notice of Intention to Drill or Deepen.

(Use Form 2-A for Notice of Intention to Plug).

(To comply with Rules of the Railroad Commission of Texas governing Oil and Gas Conservation in Texas.)

Read Carefully and Comply Fully.

In order that it may be ascertained whether or not the proposed location covered by this notice conforms to the applicable spacing regulations set down by the Railroad Commission, there are two important footages that must be shown; that is, The Nearest Distance Of Proposed Location From Lease Or Property Line And Distance Of Proposed Location From The Nearest Well On The Same Lease. Do not begin operation on any location before filing Form 1, and do not begin operations on any location not conforming to the spacing rules for such location until you receive written order from the Commission granting permission.

For the purpose of this determination draw on the back side hereof a neat, accurate sketch, made to scale, of this

lease, block, or lot locating thereon the proposed site for this location with reference to the two nearest lease lines. Also show the nearest wells on all sides of this location and the distances from the proposed location to those wells. Give names and addresses of adjoining lease or property owners, and designate all property by lease and company name. You may attach a blue print showing this information if you so desire.

Do Not Confuse Survey Lines With Lease Lines. If The Sketch Or Blue Print Shows Only A Section, Block Or Lot Out Of Your Lease, Designate Same As Being Only That Part Of The Lease.

Where the size of the tract will permit, use scale of one inch equaling 400 feet; if less than 2 acres use scale of one inch equaling 100 feet. Designate Scale To Which Plat Or Sketch Is Drawn. Also Designate Northerly Direction On The Sketch Or Plat.

Fill In Below In The Spaces Reserved For This Purpose The Footages Asked For:

Nearest distance from proposed location to property or lease line 24 feet.

Distance from proposed location to nearest drilling, completed, or applied for well on same lease ..... feet. (See Plat attached.)

Draw Sketch Above Referred To On Reverse Side Hereof Or Attach To This Notice A Blue Print Showing This Information.

This notice must be delivered to Deputy Supervisor of your district before drilling, or deepening. He will forward to the Railroad Commission, Austin, Texas.

Date January 9, 1939.

Name of company or operator:
Name: G. E. Burford.
Address: 4436 Fairfax Avenue.
City: Dallas, Texas.

Description of farm or lease:
Name (Fee owner): W. L. Fuller.
Number of Acres: 2.33 Wells No. 1, 2, 3 & 4.
Survey: D. Sanches.
Section No. ..... Block No. .....
Located in East Texas Field, Gregg County, Three Miles N. E. direction from Longview, nearest postoffice or town.

Rotary or Cable Tools: Rotary.
Date work will start drilling: At Once.
Depth to which you propose to drill: 4000 feet.
Date work will start deepening .....
If Lease Purchased with one or more wells drilled from whom purchased?

Name .....
Address .....

(Stamped) Received Austin Jan 9 1939 Oil & Gas Division.

Deliver to Deputy Supervisor in Charge of District In Which Well Is Located.

Rule 37. Spacing Rule—(Applies to all fields in the State except where special field rules govern)—No well

for oil or gas shall hereafter be drilled nearer than 300 feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than 150 feet to any property line, lease line, or subdivision line; provided that the Commission in order to prevent waste or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distance than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired, application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equaling 400 feet, accurately showing to scale the property on which permit is sought, to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten days notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect property belonging to applicant from confiscation. All pending applications shall be amended to conform to this rule before being acted upon. Upon similar application and showing the Commission may grant exceptions to the application of this rule in fields where the production is obtained from a formation which is known to be segmented by piercement of intrusive salt plugs.

"In the interest of protecting life and property and for other and just reasonable causes the Commission reserves the right in particular fields to enter special orders increasing the minimum distances provided by this rule.

"No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule and no well drilled under such a special permit, which does not conform to the terms of such special permit in all respects shall be permitted to produce oil or gas and any such well so drilled in violation of said rule or in violation of a permit granted under an exception to such rule shall be plugged."

Notice: ' Before Sending In This Form Be Sure That You Have Given All Information Requested. Much Unnecessary Correspondence Will Thus Be Avoided.

State of Texas,
County of Travis.

I, C. F. Petet, Secretary of the Railroad Commission of the State of Texas, do hereby certify that the attached instrument, described as follows:

Photostatic copy of Notice of Intention to Drill

(Form 1) filed by G. E. Burford to drill wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33 acre tract in the Sanchez Survey in Gregg County, Texas; dated January 9, 1939, with plat covering same attached.

is a true and correct copy of the original instrument now on file in the Railroad Commission, and now in my custody as Secretary and Custodian of the files of the Railroad Commission.

Witness my hand and seal of the Railroad Commission of Texas, this the 17th day of February, 1940.

(Signed) C. F. PETET,
(C. F. Petet)
Secretary.

PLAINTIFF'S EXHIBIT NO. 7-A.

I, PATRICK TYRE, an Engineer employed by HUDNALL & PIRTLE, Tyler, Texas, do hereby certify that this plat truly and correctly shows the locations of the wells as found in a survey by me on the ground on Jan. 26 A. D. 1938. Patrick Tyre

Subscribed and Sworn before me, a Notary Public, on this 17 day of Dec. A. D 1938

Notary Public in and for Smith County Texas

PLANE TABLE PLAT

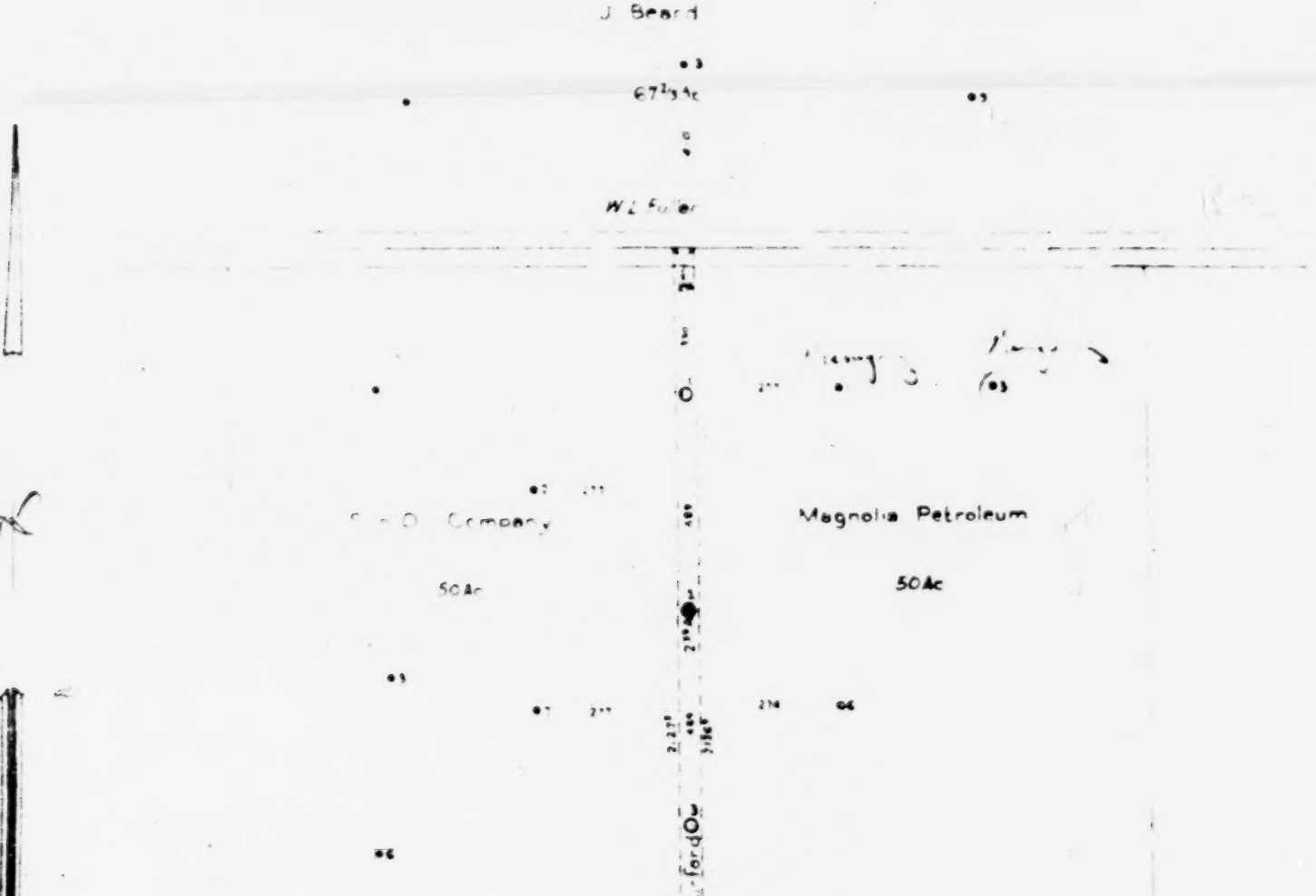
G. E. Burford – W. L. Fuller

D SANCHES SUR GREGG CO TEXAS

SCALE 1"=400 JAN. 26, 1938

Hudnall & Pirtle

Revised from Permit Records 12-26-38



Mr. Rauhut:

We next offer in evidence a copy of the Notice of Hearing on that Application, calling a hearing for January 31, 1939, showing the parties that were notified of the hearing; and we want to call attention to the fact that the owners to the west and northwest—that is, the owners of the lease to the northwest of the Sun Oil Company tract as shown on Exhibit 1 were not notified of this hearing, they were notifying only those owners who had tracts adjoining the 2.33 acres.

(Thereupon the Notice of Hearing referred to above was marked for identification as Plaintiff's Exhibit No. 8,—same being here set out as follows):

152 PLAINTIFF'S EXHIBIT No. 8.

(In Red Pencil) 1-31 at 9:30.

Railroad Commission of Texas,
Oil and Gas Division.
Austin, Texas.

Jan. 18, 1939.

G. E. Burford, 4436 Fairfax Ave., Dallas, Texas.

Magnolia Petroleum Co., Dallas, Texas.

Sun Oil Co., Dallas, Texas.

The Atlantic Refining Co., c/0 H. C. Renz, Box 2819, Dallas, Texas.

Standard Oil Co. of Kansas, Box 256, Dallas, Texas.

J. G. Beard, Duncan, Okla.

C. B. Jeffrey, Littlefield Bldg., Austin, Texas.

H. L. Williford, Railroad Commission, Kilgore, Texas.

Gentlemen:

Please accept this as notice of hearing to be held covering the application of G. E. Burford for special permit to drill wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33 acre tract in the D. Sanches Survey, Gregg County.

The locations desired are:

No. 1—330 feet south of the north line; midway between east and west lines.

No. 2—489 feet south of location No. 1; midway between east and west lines.

No. 3—489 feet south of location No. 2; midway between east and west lines.

No. 4—330 feet north of the south line; midway between the east and west lines.

Four wells on this tract at slightly different locations were denied by the Commission on September 21, 1938, in Rule 37, Case No. 26,868. On January 10, 1939, the Railroad Commission granted the applicant's motion for rehearing.

Rehearing will be held in the offices of the Oil & Gas Division in Austin, Texas, at 9:30 A. M., January 31, 1939.

Yours very truly,
STANFORD PAYNE,
(Stanford Payne)
Chief Deputy Supervisor,
Oil & Gas Division.

Mr. Rauhut:

Gentlemen, may it be agreed that following the hearing on the notice last offered, the Railroad Commission entered an order, a copy of which is atıached as Exhibit "A" to the Bill of Complaint, the order being dated March 25, 1939, granting location No. 2, and denying locations Nos. 1, 3 and 4?

Mr. Hart:

Mr. Rauhut, we have not compared that copy of yours. I presume it is accurate. We have no objection to saving time on that.

Mr. Rauhut:

If there is any mistake in it, we want it corrected, and will be glad to have it done. Will you call attention to it, after you have checked it, in the event you find any error?

Mr. Hart:

Yes, sir, I will.

Mr. Rauhut:

Is that agreeable to you, Mr. Kuykendall, also?

Mr. Kuykendall:

Yes, sir.

(Thereupon the Order referred to above was received in evidence, same being here set out as follows):

154 EXHIBIT "A"—Order of the Railroad Commission of Texas, dated 3/25/39, omitted from the printed record, being heretofore copied at page 30.

* * * * * * * * *

Mr. Rauhut:

It is admitted by the pleadings that following the entry of that order on March 25, 1939, that the defendant Burford applied for a rehearing, within the time required by the Commission's rules, on his locations 1, 3 and 4, and that Sun Oil Company applied to the Commission for a rehearing on location No. 2. I merely call attention to the agreement—I mean to the pleadings on that point, as stated in the pleadings, without offering proof on that.

The Court:

As I understand it, the Commission reheard the matter and granted all four of them.

Mr. Rauhut:

Yes, sir.

The Court:

All right. Any dispute about that?

Mr. Cale:

None from us, Your Honor,—no dispute from us on that.

The Court:

All right.

Mr. Rauhut:

It is entered an order granting a rehearing on April 29, 1939, on both motions for a rehearing.

The Court:

All right.

Mr. Rauhut:

We next offer in evidence the Order which is complained of, granting a permit to drill four locations on

this tract, dated June 2, 1939,—a copy of which is attached to the Complaint as Exhibit "B". May that be considered in evidence—that Exhibit "B", which is a true copy of the original order, or if you wish—

Mr. Cale:
That is agreeable with us, Your Honor, if it is a correct copy. We have not checked it recently.

The Court:
All right.

Mr. Kuykendall:
The other defendants will agree to that.

The Court:
All right; let the record so show.

(Thereupon the Order referred to above was received in evidence, same being here set out as follows):

157 EXHIBIT "B"—Order of Railroad Commission of Texas, dated 6/2/39, omitted from the printed record, being heretofore copied at page 31.

* * * * * * * * *

Mr. Rauhut:
If Your Honor please, as bearing upon the reasonableness of the Order of the Railroad Commission we desire to offer in evidence the Motion for Rehearing which Sun Oil Company filed with the Railroad Commission on June 22, 1939, in which and in addition to stating other grounds of objections which are presented in the petition, the Sun Oil Company offered to pool this lease with this 2.33 acres in order that Mr. Burford could get his share

of the oil without any necessity for drilling any wells on this strip.

The Court:
What do you say, gentlemen?

Mr. Cale:
Your Honor, we have no objection to the introduction of the original, or he may substitute a true copy.

The Court:
All right; it will be admitted in evidence.

(Thereupon the Motion for Rehearing referred to above was marked for identification as Plaintiff's Exhibit No. 9,—same being here set out as follows):

159 PLAINTIFF'S EXHIBIT No. 9.

In Re: Application of G. E. Burford for Permit to Drill Wells Nos. 1, 2, 3 and 4 W. L. Fuller 2.33 Acre Tract, Sanches Survey, Gregg County, Texas. (Rule 37, Case No. 26,898).

To the Railroad Commission of Texas:
Sun Oil Company and Magnolia Petroleum Company hereby petition the Railroad Commission of Texas for the following relief:

I.

That the Railroad Commission's order of March 23, 1939, granting permit to drill well No. 2 and its order of June 2, 1939, granting permit to drill wells Nos. 1, 2, 3 and 4 on the lease described in the caption and at locations indicated in such orders, be set aside after further hearing,

and that an order be entered denying the above described application in all respects for the following reasons:

1. This Honorable Commission was without jurisdiction to enter said orders because there was then and is now pending in the 53rd District Court of Travis County Cause No. 53,915, styled Sun Oil Company vs. Railroad Commission of Texas et al, appealing from order of the Railroad Commission granting applicant's predecessors in title a permit to drill a well on this said strip.

2. In Cause No. 54,769 with which was consolidated Cause No. 54,743 wherein Magnolia Petroleum Company and Sun Oil Company were Plaintiffs and the Railroad Commission and applicant's predecesosrs in title were Defendants the 53rd District Court of Travis County entered a final judgment cancelling a permit heretofore granted by the Commission for a well location on this strip, and perpetually enjoining the drilling or operation of said location for oil or gas on this strip, said permit having been granted to applicant's predecessors in title on October 11, 1934, in Rule 37 Case No. 10,956; and said judgment is res adjudicata of issues involved in this application.

3. The undisputed evidence before the Commission shows the strip, if it exists, is a subdivision from the leasehold estate in the West 50 acres of the W. L. Fuller farm and is capable of development as a whole with it, and there is no testimony that the West 50 acres and the strip, considered as an entirety for development purposes, are not reasonably protected from drainage or need either or all of the four locations in controversy in order to prevent drainage to adjacent tracts or to prevent confiscation of property within the meaning of the spacing rule

applicable to said area, and petitioners assert none of said additional wells are needed for such purpose.

4. Petitioners here now offer to pool their leases on the W. L. Fuller tract with the leasehold estate in the strip, in either of the following ways: (a) the entire strip and Sun Oil Company's adjoining lease, so they may be developed as one entire tract; (b) the entire strip and Magnolia Petroleum Company's adjoining Fuller lease, so they may be developed as one entire tract; (c) pool half of the strip with Sun Oil Company's adjoining lease and half of the strip with Magnolia Petroleum Company's adjoining Fuller lease. Under either of the above offers, the owner of the leasehold estate in the strip and the owner of the leasehold estate in the property pooled with it would share ratably in future production from the pooled property in proportion to the acreage so contributed by each owner, less deduction in the same proportion for future drilling and operating expenses.

5. The drilling and operation of said four locations on the land covered by the application, considered as a separate tract, are not necessary to give the owner thereof an opportunity to produce the equivalent of the recoverable oil in place under it. One well will give the strip a great advantage over petitioners' adjoining leases. The granting of permit for four locations permits applicant to drain and confiscate petitioners' property without compensation, and denies them due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution.

6. Each and all of said four locations are unnecessary to prevent waste of oil and gas, as the existing wells are sufficient to recover the recoverable oil in place. The drilling and operation of each or either of said locations will force offsets in close proximity and at closer distances

than are provided in the spacing rule, causing uneven spacing and withdrawals, which will cause waste of oil and gas.

7. The transcript of evidence offered at the hearing held May 19, 1939, before the Commission's examiner was not transcribed until after this Commission entered its order on June 2, 1939, and therefore was not read by the Commission, which had only the report of the hearing contained in the examiner's memorandum of June 1, 1939. Said memorandum is insufficient in that it fails to state with particularity the evidence adduced at the hearing held May 19, 1939, and erroneously states that protestants' witness testified the drilling of these four locations will bring about a more uniform spacing of wells on the entire Fuller 100 acres. Said memorandum fails to state that said expert testified the Fuller tract is not being drained by wells on other lands, and erroneously states the reason why Sun Oil Company refused to submit its witness for cross-examination by applicant, the true reason being that applicant's witness refused to permit Sun Oil Company's attorneys to further cross-examine him, and the examiner refused to compel same, and Sun Oil Company offer to submit its witness to cross-examination by applicant when applicant's witness submitted to further cross-examination. By reason thereof petitioners have not had a full and proper hearing by this Railroad Commission.

II.

In the alternative, if the Commission holds there is any reasonable basis for permitting the drilling of each or either of said four locations on the strip as a separate tract, petitioners hereby request that the allowable production of such locations as this Commission decides to permit on said strip be adjusted, and that the permit for drilling and operating same be expressly so conditioned,

that the total allowable production from said 2.33 acre strip on each producing day shall not exceed 2.33/100ths of the total allowable production for the remaining and adjoining 100 acres of the W. L. Fuller tract as fixed by the Railroad Commission for each said day; and petitioners show that such provision and condition will enable G. E. Burford to produce, and only produce, his fair share of the oil in place.

A copy of this motion has been mailed to G. E. Burford.

Wherefore Petitioners each pray that the relief herein requested be granted.

SUN OIL COMPANY,

By .....,

MAGNOLIA PETROLEUM COMPANY,

By .....

Mr. Rauhut:

We next offer in evidence the Order of the Railroad Commission of July 10, 1939, denying the petition for rehearaing and alternative relief filed by Sun Oil Company and Magnolia Petroleum Company on June 22, 1939.

(Thereupon the Order referred to above was marked for identification as Plaintiff's Exhibit No. 10,—same being here set out as follows:)

164 PLAINTIFF'S EXHIBIT No. 10.

Motion for Rehearing by Sun Oil Company and Magnolia Petroleum Company.

Case No. 26,868—Rule 37.

Applicant:
G. E. Burford, 4436 Fairfax Avenue, Dallas, Texas.

Motion for rehearing in the above styled case having been this date considered by the Railroad Commission of Texas, and it appearing that the reasons set out in said motion are insufficient to justify the granting of a rehearing covering the application of G. E. Burford for a special permit to drill wells Nos. 1, 2, 3, 4, on the W. L. Fuller 2.33 acre tract, Sanches Survey, Gregg County, Texas:

Now, Therefore, It Is Ordered that the motion for rehearing filed by the Sun Oil Company and Magnolia Petroleum Company be in all things denied.

Entered at Austin, Texas, on this the 10th day of July, 1939.

(Signed) LON A. SMITH,
Chairman.

Attest:
C. F. PETET,
Secretary.

....., Commissioner,

(Signed) JERRY SADLER,
(Seal) Commissioner.

/zk.

State of Texas,
County of Travis.

I, C. F. Petet, Secretary of the Railroad Commission of the State of Texas, do hereby certify that the attached instrument, described as follows:

Order of the Railroad Commission of Texas, dated July 10, 1939, in re Case No. 26,868, Rule 37. Entitled: "Motion for Rehearing by Sun Oil Company and Magnolia Petroleum Company"

is a true and correct copy of the original instrument now on file in the Railroad Commission, and in my custody as Secretary and Custodian of the files of the Railroad Commission.

Witness my hand and seal of the Railroad Commission of Texas, this the 17th dy of February, 1940.

(Signed) C. F. PETET,
(C. F. Petet),
Secretary.

Mr. Rauhut:

On our plea of *res judicata* we desire to offer in evidence a certified copy of the Sun Oil Company's petition in Cause No. 54,743, styled Sun Oil Company vs. Railroad Commission of Texas et al., in the 53rd District Court of Travis County, Texas. This is an amended petition filed January 31, 1935; and judgment of the District Court of Travis County in that case, dated January 31, 1935. This judgment is styled and numbered differently from the petition, but it recites that there were two cases, and that the cause in which this petition was filed was consolidated with the other cause and tried together. This judgment cancels a permit which had been granted to Mamie Hammonds to drill on this same tract at a location 412 feet from the north line; and I would like to ask in this con-

nection that it be agreed that the permit involved in that suit was on the identical strip that is involved in the Burford application.

Mr. Cale:

As far as the Railroad Commission of Texas is concerned, Your Honor, we have agreed that the 2.33 acre tract, so far as we know, is the same tract. We will not be able to agree that the permit or application sought in that original suit was at the same location.

Mr. Rauhut:

We don't ask that. Now, Mr. Kuykendall, do you likewise agree that this permit involved in the law suit, papers in which have just been offered, involved this identical strip?

Mr. Kuykendall:

Well, I assume that it is, but I will check into it and if it is not correct, why, I will report back.

The Court:

All right.

(Thereupon the Amended Petition and the Judgment above referred to were marked for identification as Plaintiff's Exhibits No. 11 and No. 12, respectively,—same being here set out in order as follows:)

167 PLAINTIFF'S EXHIBIT No. 11.

In the 53rd District Court of Travis County, Texas.

Sun Oil Company,
vs. No. 54743.
Railroad Commission of Texas, et al.

To the Honorable Judge of said Court:

Now comes Sun Oil Company, hereinafter styled "Plaintiff", and with leave of Court first had filed this its First Amended Original Petition and still complaining of the Railroad Commission of Texas and its members, Lon A. Smith, C. V. Terrell and E. O. Thompson, and O. O. Hammonds and Mamie S. Hammonds, hereinafter styled "Defendants", and for cause of action, Plaintiff would respectfully show to the Court:

1.

Plaintiff is a private corporation duly and legally incorporated under and by virtue of the laws of the State of New Jersey, with a permit to do business in Texas, and whose principal place of business in the State of Texas is at Dallas, Dallas County, Texas.

The Railroad Commission of Texas was duly created under the laws and Constitution of the State of Texas, and Lon A. Smith, C. V. Terrell, and E. O. Thompson are the duly elected, qualified and acting members of said Commission and reside in Travis County, Texas, and the said Lon A. Smith is Chairman of said Commission, and C. F. Petet, who resides in Travis County, Texas, is Secretary of the said Commission, and such Commission and its members are empowered and charged by law with the duties of enforcing the laws of the State of

Texas providing for the conservation of oil and gas and the prevention of waste thereof.

The Defendants, O. O. Hammonds and wife, Mamie S. Hammonds, reside in Oklahoma County, Oklahoma.

1. a.

That the purported strip of 2.81 acres described hereinbelow does not in fact exist between the two 50 acre tracts described below, and the order hereinafter complained of is arbitrary and capricious because granted to a stranger to the title to said leasehold estate of plaintiff and Magnolia Petroleum Company who were and are now in actual physical possession of said land under their alleged leasehold assignments.

2.

On November 26, 1919, said Railroad Commission adopted and promulgated Rule 37, as follows:

"Rule 37. No well for oil or gas shall hereafter be drilled nearer than three hundred (300) feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than one hundred and fifty (150) feet to any property line; provided, that the Commission, in order to prevent waste or to protect vested rights, will grant exceptions permitting drilling within shorter distances than as above prescribed, upon application filed fully stating the facts, notice thereof having first been given to all adjacent lessees affected thereby."

Said rule was in full force and effect on the dates hereinafter alleged to and including February 28, 1931.

3.

By instrument dated July 31, 1930, recorded in Volume 4, page 1, of the records of Gregg County, Texas, the owners of the fee conveyed to J. A. Reynolds an oil and gas mining lease, among other lands, on the following described tract in Gregg County, Texas, to-wit:

"A part of the D. Sanchez H R survey, situated about 8 miles NW of Longview, Texas, Beginning at a stake in the South line of the Alexander Survey, being the NW corner of a tract surveyed for J. B. Harley and now owned by Bob Smith;

"Thence West, passing the SW corner of the M. Irwin Survey at 731 vrs. on 751.4 vrs. to a corner in the S. line of the said Irwin Survey;

"Thence South 751.4 vrs. to a stake on the West bank of a branch from which a Maple brs. S. 77 E. 7 vrs.;

"Thence E. 751.4 vrs. to a large Sweet Gum in a branch for corner;

"Thence North 751.4 vrs. to the place of beginning, and containing 100 acres of land, more or less."

By instrument dated September 15, 1930, recorded in Volume 60, page 115 of the Gregg County, Texas, records, the said J. A. Reynolds assigned said lease on the lands next above described to Defendant, Mamie S. Hammonds, using the identical description and filed notes as quoted next herein above.

On December 18, 1930, by an instrument recorded in Volume 67, page 47 of the Deed Records of Gregg County, Texas, Defendants O. O. Hammonds and Mamie Ham-

monds, first describing said original lease as hereinabove quoted as to description and field notes, assigned the same to Claude Bell and R. A. Grady, as follows, to-wit:

"In so far as it covers the E fifty (50) acres of the above described land."

On February 28, 1931, by instrument recorded in Vol. 75, page 86 of the Deed Records of Gregg County, Texas, the Defendants, O. O. Hammonds and Mamie S. Hammonds, first describing said lease as first hereinabove quoted as to description and field notes, assigned the same to Plaintiff as follows, to-wit:

"In so far as it covers the West Fifty (50) acres of the above described tract of land."

That the Defendant, Mamie S. Hammonds, joined by her husband, filed with the Railroad Commission an application to drill a well on the 2.81 acre tract described hereinbelow, and that said application was duly set for hearing by the Railroad Commission, and notices were sent out to all adjoining lessees, and thereafter, on the 11th day of October, 1934, hearing upon said application was had before the Railroad Commission at which hearing the Sun Oil Company and the Magnolia Petroleum Company each appeared and offered evidence at such hearing, showing the facts alleged in this petition, and each protested the granting of said permit on all the grounds herein set out, and that the evidence introduced at said hearing showed that the strip herein involved had been segregated from the remainder of the leased land held by Mamie S. Hammonds in the manner herein stated; that the Railroad Commission, at the conclusion of said hearing, thereafter entered its order as set out hereinbelow.

4.

That on the 11th day of October, 1934, the Railroad Commission entered an order, granting the Defendant Mamie S. Hammonds a permit to drill a well for oil and gas on a strip of land alleged to contain 2.81 acres in the Dolores Sanchez Survey, Gregg County, Texas, said strip of land being midway between the east and west lines of the 100 acre tract, and extending from the North to the South lines thereof; being approximately 50 feet wide East and West by approximately 2100 feet long North and South, said well to be spaced on said strip 412 feet from the North line and midway between the East and West lines of the said strip. Defendants O. O. Hammonds and Mamie S. Hammonds claiming that by actual measurement between its four corners, there is contained in said tract as originally leased as hereinbefore alleged, 102.81 acres of land, and that the 2.81 acre strip in the center of said tract lies West of the 50 acres first assigned by them to Bell and Grady, and East of the 50 acres assigned by them to Plaintiff, all as hereinbefore alleged, and that they are the owners of the leasehold estate in, on and to the same, and that same was not included in their assignment to Bell and Grady nor in their assignment to the Plaintiff.

That this Plaintiff filed a Motion for Rehearing on such application asking that the Railroad Commission deny the permit upon such re-hearing, on the grounds alleged herein, which grounds were set up in the Motion for Rehearing, and such motion was, without further hearing, overruled by the Commission on the 7th day of November, 1934.

That under the terms and provisions of said Rule 37 no oil or gas well could be drilled closer to a property or division line than 150 feet nor closer than 300 feet from any drilling or completed oil or gas well, and no exception to said rule could be granted by the Railroad

Commission except for the purpose of protecting vested rights or for the purpose of preventing waste of oil and gas. The aforesaid Rule 37 applied to the drilling of oil and gas wells in what is known as the East Texas field, of which the lands herein mentioned as a part, and continuously remained in effect since the date of its adoption, except as amended as hereinafter shown, and is a valid and binding rule and regulation. Said rule applied to the drilling of wells in the East Texas field, in the form in which said rule was originally adopted, until September 5, 1931, at which time said rule was amended to provide that no well should thereafter be drilled for oil or gas in the East Texas field at any point less than 660 feet from any drilling or completed well, and at any point less than 330 feet from any property or division line.

Plaintiff shows that the spacing requirements of Rule 37 as originally promulgated have not been lessened by any of the amendments thereto applicable to the East Texas field, but that each and all of said amendments thereto, commencing with the amendments of September 5, 1931, have provided that wells should be spaced at least 660 feet from any drilling or completed well and 330 feet from any property or division line, provided, however, that the Commission, in order to prevent waste or to protect vested rights will, after hearing, grant exceptions permitting drilling within a less or shorter distance than prescribed in such amendments, upon application duly filed stating the facts, notice of such application having first been given to all adjacent lessees affected thereby and hearing having been held thereon.

Since Rule 37 was amended in so far as it applies to the East Texas field on or about September 5, 1931, said original rule, or some amendment thereto requiring wells

to be spaced 330 feet from any property or division line and 660 feet from other drilling or completed wells, has been in effect continuously at all times, constituting a continuous regulation governing the spacing and drilling of oil wells in the East Texas oil field.

On June 13, 1933, effective as of that date, Rule 37 was further amended by the Railroad Commission as applicable to the East Texas field so as to read as follows, to-wit:

"Rule 1: (a) Rule, 37, adopted November 26, 1919, is hereby amended in so far as it applies to the East Texas field so as to hereafter read as follows: 'No well shall hereafter be drilled for oil or gas at any point less than six hundred and sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than three hundred and thirty (330) feet from any property or division line, provided, however, the Commission in order to prevent waste, or to protect vested rights, or to protect any property against undue drainage by reason of the operation of the wells of any other operator, will after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby; provided, that if all adjacent lessees affected thereby waive in writing notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing; and provided further than in cases of forced offsets the Commission may grant exceptions without waivers or hearing when it is evident that the wells desired are necessary to protect the properties on which it is proposed to drill them.'"

Said amended rule is a valid and binding rule and regulation and governs the spacing and drilling of oil wells in the East Texas field and has continuously remained in effect since the date of its adoption until May 29, 1934, at which time such rule was further amended, as hereinafter shown. Under said amended rule dated June 13, 1933, no one is authorized to drill an oil or gas well in the East Texas field at any point less than 660 feet from any drilling or completed well or less than 330 feet from any property or division line, except by special permission from the Railroad Commission granted under the terms of said rule for the purpose of preventing waste or to protect vested rights or to protect any property against undue drainage by reason of the operation of wells by other operators in the field.

On May 29, 1934, effective as of that date, Rule 37 was further amended by the Railroad Commission as applicable to the East Texas field so as to read as follows, to-wit:

"It Is Hereby Ordered by the Railroad Commission of Texas that Rule No. 1 of Subdivision II (Drilling) on Division 3 being special rules governing the East Texas field, is hereby amended so as hereafter to read as follows:

"*Rule 1. Spacing Rule.* No well for oil or gas shall hereafter be drilled in said East Texas field nearer than 660 feet to any other completed or drilling well on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line, or subdivision line; provided that the Commission in order to prevent waste, or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to pre-

vent the confiscation of property. When an exception to such rule is desired, application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied by a plat drawn to the scale of one inch equaling four hundred feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling, and permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating all facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten days notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect the property belonging to applicant from confiscation. All pending applications shall be amended to conform to this rule before being acted upon.

"No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule, and no well drilled under such a special permit which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas; and any such well so drilled in violation of said rule or in violation of a permit granted as a special exception to said rule shall be plugged.

"The order entered by this Commission on August 30, 1933, commonly designated as the direct and equidistance offset order is hereby rescinded, annulled and shall be of

no further force and effect. All other rules, regulations and orders of this Commission which conflict with the terms and provisions of Rule No. 1 as hereby amended and promulgated are hereby declared to have no further application to wells in said East Texas field to the extent of such conflict.

"In the adoption and promulgation of this order it is here declared that the Commission intends to adopt each phrase, sentence, and paragraph, separately and independently of each other such phrase, sentence and paragraph, and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion."

In connection with said amendment dated May 29, 1934, and supplementing same, the Railroad Commission on said date entered an order applicable to the East Texas field, reading as follows:

"It Is Ordered by the Railroad Commission of Texas that in applying Rule 37 (Spacing Rule) of state-wide application and in applying every special rule with relation to spacing in every field in this State no subdivision of property made subsequent to the adoption of the original spacing rule will be considered in determining whether or not any property is being confiscated within the terms of such spacing rule, and no subdivision of property will be regarded in applying such spacing rule or in determining the matter of confiscation if such subdivision took place subsequent to the promulgation and adoption of the original spacing rule."

Said amendments to the spacing rule dated May 29, 1934, are valid and binding rules and regulations and govern the spacing and drilling of oil wells in the East

Texas field, and have continuously remained in effect since the date of their adoption and are now in effect. Under said amended rule dated May 29, 1934, no one is authorized to drill an oil or gas well in the East Texas field at any point less than 660 feet from any drilling or completed well or less than 330 feet from any property or division line, except by special permission from the Railroad Commission granted under the terms of such rule for the purpose of preventing waste or for the purpose of preventing confiscation of property drainage of oil therefrom through wells on adjoining tracts, provided the particular property on which it is proposed to drill a well in exception to said rule has not been subdivided from other properties or created into separate tracts from adjoining properties for development purposes since November 26, 1919.

5.

Plaintiff brings this suit as an appeal from said order of the Defendant Commission under the Revised Civil Statutes of Texas.

6.

Plaintiff would show that the order of the Defendant Railroad Commission, complained of, is invalid for the following reasons:

1. The land as originally leased by the fee owners on July 31, 1930, was rectangular in shape, was in one contiguous body, and was susceptible of development for oil and gas as a whole in strict conformity with said Rule 37, and with the conservation laws of the State of Texas, then in force, and neither the fee owners nor their lessee, nor any assignee of their lessee, had, or thereafter acquired, any vested right to develop the same for oil and

gas except in conformity with Rule 37, and the conservation laws of the State of Texas.

2. That if said original 100 acres actually contain 102.81 acres, which is not admitted, but is expressly denied by Plaintiff, by their assignment of the East 50 acres of said tract to Bell and Grady, as aforesaid, and by their assignment of the West 50 acres of said tract to the Plaintiff, as aforesaid, the Defendant Hammonds waived and divested themselves of all and every vested right to develop said land or any part thereof for oil and gas, because said claimed strip 50 feet East and West by 2100 feet North and South is not capable of development in conformity with Rule 37, or under any exception to said rule, and with the conservation laws of Texas; that Defendants O. O. Hammonds and Mamie S. Hammonds by the two assignments of 50 acres each herein alleged, segregated the strip herein involved from the remainder of said land in view of Rule 37 and of the conservation laws of Texas, and are now estopped from drilling, cannot drill said strip for oil and/or gas, and from claiming and cannot vested right to drill same for said purpose.

3. Because said order is unreasonable, arbitrary, and discriminatory and should be annulled, in that said order permits the Defendants Hammonds to drill a well for oil and gas on a 2.81 acre narrow strip of land 50 feet wide and 2100 feet long, and within 25 feet of Plaintiff's east line; that if drilled, a location 50 feet to the East, and another 50 feet to the West of said location will be forced thereby, or three wells on a line 100 feet in length, which said wells, thus grouped, will cause a low pressure area when produced, and will cause great waste of oil and gas and of pool energy as will be hereinafter shown, all in violation of the letter and spirit of the conservation laws of Texas, and in direct contravention of Rule 37 of the Defendant Commission, and enables the Defendants O. O.

Hammonds and Mamie S. Hammonds, to unfairly compete with this Plaintiff in producing oil and gas from said leasehold estate.

7.

Plaintiff says that it purchased the oil and gas mining lease on the West 50 acres of said original tract from the Defendants O. O. Hammonds and Mamie S. Hammonds, and that the said Defendants sold said leasehold estate to this Plaintiff in view of the conservation laws of Texas, and in view of said Rule 37, then in force, and upon the implied and express agreement, representation and assurances, as expressed in said assignment, that the distances between the four corners of said original tract, each, respectively, was 751.4 varas, and the courses from and to the beginning corner were due west, south, east and north, respectively, and that the West 50 acres of said original tract so assigned to Plaintiff, was and would be contiguous to the East 50 acres of said tract theretofore assigned to the said Bell and Grady, and that the West line of said West 50 acres would be coincident with the West line of said original 100 acre tract, and with the implied assurance that the four lines of Plaintiff's said estate thus assigned would never be offset by wells drilled upon said original tract closer to Plaintiff's said property lines than 150 feet, and that Plaintiff would never be required to drill a well, and that no well would be drilled closer than 150 feet to the dividing line between the East and West 50 acres of said original 100 acre tract; that in reliance thereon, and in perfect good faith, Plaintiff has developed its leasehold estate along its East boundary line in consonance with said Rule 37; that in September, 1931, Defendant Railroad Commission amended its said Rule 37 so as to prohibit drilling wells for oil and gas in the East Texas field at a closer distance than 330 feet from prop-

erty lines and 660 feet from drilling or completed wells, and this Plaintiff has developed its said leasehold estate along its East line in consonance with such amended Rule, spacing its wells full 330 feet West from its East line at a cost of approximately Fifteen Thousand ($15,000) Dollars for each well so drilled, and in full reliance upon said implied agreement and assurance of the said Defendants Hammonds shall be permitted to drill said claimed strip of land for oil and gas, Plaintiff will be required to offset each said well so drilled by an equi-distance West offset, unnecessary to a proper development of Plaintiff's leasehold estate but for such drilling by Defendants Hammonds to its great and irreparable injury. Each such offset well will cost approximately Fifteen Thousand ($15,000) Dollars and Defendants O. O. Hammonds and Mamie S. Hammonds being non-residents of the State, a moneyed judgment can not be had against them, or either of them, because no personal service can be had upon them in Texas, and Plaintiff has no remedy in law; that Plaintiff can not obviate the injury to it by drilling such offset wells in that the wells now drilled on Plaintiff's said lease are adequate to drain all of the recoverable oil in and under such area, and by grouping wells along said narrow strip will augment the injuries to Plaintiff as will be hereinafter alleged, and will occasion great waste of oil and pool energy as will be shown, and that its right to offset such wells is not an adequate remedy, and Plaintiff has no adequate remedy in law.

8.

Plaintiff says that by reason of the facts alleged, Defendants O. O. Hammonds and Mamie S. Hammonds are estopped from drilling said strip of land; that the wells now on said 100 acre tract are sufficient to drain all of the oil and gas from and under said tract in the area where Defendants O. O. Hammonds and Mamie S. Ham-

monds seek to drill, and that the location complained of is not forced; and in the alternative, Plaintiff says that in the event the said 100 acre tract is not now sufficiently developed for oil and gas purposes in order to recover all of the oil and gas underlying said tract, that the said 100 acre tract, taking the same as a whole tract, including the purported 2.81 acres excess, can be adequately drilled and developed for oil and gas purposes so as to recover all of the oil and gas lying thereunder to which the lease-owners and fee and royalty owners of the said entire tract are entitled to recover under and by virtue of the rules and regulations of the Railroad Commission and the conservation laws of the State of Texas, and in accordance with the spacing provisions of Rule 37, without the necessity of drilling on the 2.81 acre tract, or any part thereof; that the said 2.81 acre tract, as a part of the entire 100 acre tract, is now adequately protected from drainage by any surrounding leases, of which it did not formerly form a part of a whole tract; that if said strip of land actually exists on the ground as additional to the East and West 50 acres of said original tract, and if the same was not, as a matter of fact and law, included in the said assignments to Bell and Grady, and to Plaintiff, this Plaintiff here now offers to pay the Defendants Hammonds the same per acre consideration for the said 2.81 acre strip as was paid by Plaintiff to the said Defendants for the West 50 acres of the said original tract, and here now proposes and offers, in good faith to do full equity to the Defendants Hammonds to the end that the injuries to Plaintiff here complained of may be obviated, and its property and the State's natural resources be conserved.

8-a.

That the Plaintiff, Sun Oil Company, claims title to the oil and gas lease under the portion of said land as herein alleged under an assignment of 50 acres thereof

executed by Mamie S. Hammonds and her husband, O. O. Hammonds, on February 28, 1931; recorded in Vol. 75, page 86, of the Deed Records of Gregg County, Texas; that the said assignment contained in substance the following provision:

"And for the same consideration, the undersigned for herself and her heirs, successors and representatives, does covenant with the said assignee, their heirs, successors, or assigns, that Mrs. Mamie S. Hammonds, is the lawful owner of the said lease and rights and interest thereunder and of the personal property thereon or used in connection therewith; that the undersigned has good right and authority to sell and convey the same, and that said rights, interest and property are free and clear from all liens and encumbrances, and that all rentals and royalties due and payable thereunder have been duly paid and that the undersigned will warrant and defend the same against the lawful claims and demands of all persons whomsoever."

That thereby the said Mamie S. Hammonds and her husband O. O. Hammonds, are estopped to claim any right in and to any of the oil and/or gas underlying the 50 acres of land covered by the said assignment, and to directly or indirectly withdraw any of said oil and/or gas from beneath said land.

That the Intervener, T. S. Schroeder, claims title to the strip of said land he contends was left when the two assignments of 50 acres each herein referred to were executed. That in the assignment to him, executed by Mamie S. Hammonds and husband, is included the following provision and recital:

"Thence west to the place of beginning; containing 2.81 acres of land; it being intended hereby to assign all the

leasehold interest which we still own in the said W. L. Fuller 100 acre tract;"

That thereby, the said T. S. Schroeder is charged with notice of all the provisions and recitals of previous assignments of portions of said lease made by the said Mamie S. Hammonds and or her said husband, and with notice and knowledge of such facts as would have caused a person of ordinary prudence to have made a reasonably diligent investigation, and that a reasonably diligent investigation, if made by said Schroeder, would have lead to knowledge on his part that the said Mamie S. Hammonds and husband had executed the said assignments of 50 acres each herein alleged and incorporated therein the said provision herein copied and claimed as warranties of title.

That if the well involved herein is drilled, it will be within approximately 25 feet of the East and West boundary lines of the said strip, and if permitted to produce oil, it will drain oil from beneath the leases of the Sun Oil Company to the west thereof, and the Magnolia Petroleum Company to the East thereof, and thereby the oil and or gas conveyed under said assignments to said companies will be withdrawn and appropriated by the Defendants and Intervener in violation of the said assignments and covenants therein. That it is impossible to accurately determine or prove the amount of oil that will be drained from beneath the said adjoining land, if drilling of said well is permitted, and that the East Texas Oil Field and the properties herein involved will probably produce oil for ten or more years, and any cause of action for drainage of adjoining land by said well will in large part be barred by the statutes of limitation before the expiration of such period, and that since such drainage is impossible of definite proof, Plaintiff has no adequate remedy at law.

That at the time of the subdivision or segregation of the 2.81 acre strip from the remainder of the 100 acre tract, the land was situated within what is now a part of the East Texas Oil Field, and at which time the land was considered valuable for oil and gas purposes, and numerous tracts, including the 102.81 acre tract, were being leased at such time for oil and gas development.

9.

Plaintiff says that the said original tract of land including the strip of land herein involved, are located in what is designated by the Defendant Railroad Commission as the East Texas field; that the entire original tract is underlaid with a woodbine sand which is saturated with oil and gas, and which constitutes a common oil pool; that the lifting force which forces the oil through said sands, into and through wells drilled therein is hydrostatic pressure vertically and from the westward on the western edge of said pool; that if said well is permitted to be drilled by the Defendants O. O. Hammonds and Mamie S. Hammonds, an equidistant offset well will be forced to the East and West thereof, thus forcing the drilling of three wells along a line 100 feet in length, and when produced, will occasion a low pressure area at such point, to equalize the pressure in and about such area, oil will be forced toward such point from surrounding high pressure areas at a great sacrifice and loss of energy. With lowering of pressure gas wastage will start, which when exhausted or diminished increases the viscosity of the crude, thus leaving great quantities of oil in place in such structure; that one well at such location is amply sufficient to drain fifteen acres of recoverable oil, and to drain all of the recoverable oil in and under fifteen acres of land; that the three wells located as herein alleged will eventually exhaust great and inestimable quantities of energy from, in and under Plaintiff's leasehold estate,

and from the lands lying east thereof, and will leave great and inestimable quantities of oil in place thereunder, which can never thereafter be recovered, to the great and inestimable loss and injury to Plaintiff and to the State, and Plaintiff has no remedy at law to prevent it.

10.

Plaintiff says that the injuries herein alleged and complained of can not be prevented by drilling an equidistant offset to Defendants Hammonds' said location because one well is sufficient, in said area, to drain all of the recoverable oil from and under fifteen acres of land; that an equidistant offset well on Plaintiff's land West from said location can not prevent the Defendants Hammonds' proposed well, located as it is, 25 feet East from Plaintiff's East line, from draining a great and inestimable quantity of oil and gas from Plaintiff's said land, title to which was acquired, as aforesaid, from the Defendants O. O. Hammonds and Mamie S. Hammonds, for a valuable consideration, and the Defendants O. O. Hammonds and Mamie S. Hammonds warranted title to the same by general warranty in writing; that because of the migratory nature of oil passing from high to low pressure structure, it is impossible to know or to approximate with reasonable certainty the amount of oil in barrels that will be drawn from Plaintiff's leasehold estate, but the Plaintiff says that it will be great and inestimable, and that Plaintiff has no adequate remedy at law to prevent it; that this Plaintiff here now pleads such general warranty of the Defendants O. O. Hammonds and Mamie S. Hammonds, as expressed in their assignment of the said leasehold estate to this plaintiff in estoppel of their claim or right to drill said narrow strip; that by reason of all of the facts hereinbefore alleged the action of the Defendants Hammonds in drilling and in attempting to drill said well, and in developing and attempting to de-

velop said long narrow strip of land for oil and gas, is a fraud upon this Plaintiff, which should be restrained in equity, Plaintiff being without remedy in law as hereinbefore alleged; that by drilling an equidistant west offset to said location complained of herein, Plaintiff will but augment the injuries complained of, in that the group of wells drilled at such close proximity one to the other will produce a low pressure area as hereinbefore alleged, which for the reasons alleged, will result in great waste of petroleum oil that would otherwise be recovered by the Plaintiff and the lessees to the east and north, because of the exhaustion of pool energy as aforesaid, quantities of oil will be left in place with no propelling and lifting force to remove it, and can never thereafter be recovered, to the great and inestimable injury and damage to this Plaintiff. Plaintiff having exhausted its remedy without avail is without remedy in law to prevent the injuries complained of, that the defendants are unable to respond in damages to this plaintiff.

Wherefore, Plaintiff prays that a temporary restraining order issue herein, restraining the Defendants O. O. Hammonds and Mamie S. Hammonds, their agents, servants, employees, contractors and legal representatives from drilling, and from attempting to drill, and from permitting the drilling of such well on said strip of land, and or from producing oil from any such well location no well having been begun at said location to this date; that this cause be set for hearing by the Court on a day certain, and that the Defendants, and each of them, be notified thereof and cited in terms of law to appear and show cause why a temporary injunction should not issue, and that on such hearing, a temporary injunction issue so restraining and enjoining the Defendant O. O. Hammonds, and wife, Mamie S. Hammonds, their agents, servants, employees, contractors and legal representatives; that the said Defendants, and each of them, be cited in

terms of law to appear and answer herein, and that upon trial hereof, Plaintiff have judgment decreeing said 2.81 acre strip to be a part and parcel of Plaintiff's leasehold estate as assigned to it, and in any event, that the order of the Defendant Railroad Commission be in all things annulled, canceled and held to be invalid, and of no force and effect, and that the temporary injunction be made permanent against the Defendants O. O. Hammonds and Mamie S. Hammonds, their agents, servants, employees, contractors and legal representatives; that if it shall be determined that the said 2.81 acre strip exists and that same was not included in the assignment to Plaintiff of the leasehold estate in, on and to the West 50 acres of the said original tract, then and in that event, that Defendants O. O. Hammonds and Mamie S. Hammonds be required to accept from Plaintiff the same per acre consideration therefor as was paid and accepted for the said West 50 acres of said original tract, the Plaintiff, in any event, being ready, willing, and hereby proposing to do full equity to and by the Defendants O. O. Hammonds and Mamie S. Hammonds, and that all title and claim of the said Defendants in and to the said 2.81 acre strip be divested out of them, and each of them, and that title in and to the leasehold estate in, on and to the same be vested in this Plaintiff, for all costs of suit, and for full relief in law and in equity.

E. R. PEDIGO,
T. L. FOSTER,
J. W. TIMMINS,
POWELL, WIRTZ, RAUHUT & GIDEON.

(Signed) By W. S. GIDEON,
Attorneys for Plaintiff,
Sun Oil Company.

Indorsed: No. 51,743, in the 53rd District Court, Travis County, Texas; Sun Oil Company vs. Railroad Commission,

et al; Plaintiff's First Amended Original Petition. Filed January 31st, 1935, Geo. H. Templin, District Clerk.

The State of Texas,
County of Travis.

I, Geo. H. Templin, Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Plaintiff's Amended Original Petition in Cause No. 54,743 wherein Sun Oil Company is Plaintiff and Railroad Commission, et al, are Defendants, as the same appears on file in this office.

Given under my hand and seal of office, at Austin, Texas, this the 4th day of February, A. D. 1941.

(Signed) GEO. H. TEMPLIN,
(Geo. H. Templin),
(Seal) Clerk of the District Courts
of Travis Co., Texas,
By ....., Deputy.

192 PLAINTIFF'S EXHIBIT No. 12.

In the 53rd District Court, Travis County, Texas,
Regular Term, 1935.

Magnolia Petroleum Company, et al.,
vs. No. 54,769.
Railroad Commission of Texas, Mamie S. Hammonds, et al.

On the 31st day of January, 1935, came on to be heard the above entitled and numbered cause, which cause was consolidated, by agreement of the parties, with Cause No. 54,743, styled Sun Oil Company vs. Railroad Commission, et al, on the docket of said Court; and came Plaintiffs, Sun Oil Company and Magnolia Petroleum Company,

by their attorneys, the Defendants, Railroad Commission of Texas and its members by Assistant Attorney General Harry Pollard, and Defendants Mamie S. Hammonds and husband, O. O. Hammonds, and Intervener T. S. Schroeder by their attorneys, and all parties announced ready for trial, whereupon, the Plaintiffs presented their pleadings to the Court, and the Defendants thereupon presented a general demurrer, which general demurrer was sustained by the Court, whereupon each of the Plaintiffs asked leave to amend, and with leave of Court did amend and file their First Amended Original Petitions, whereupon the Defendants presented a general demurrer to each First Amended Original Petition of the Plaintiffs, which general demurrer was in all things overruled; whereupon, the Defendants Mamie S. Hammonds and husband, O. O. Hammonds, and the Intervener T. S. Schroeder presented to the Court certain Exceptions, all of which were overruled, except the ones specifically designated hereinbelow, to which judgment of the Court said Defendants duly excepted, the Court sustaining Special Exceptions Nos. 28, 29 and 35, to which order sustaining said three Special Exceptions each of the Plaintiffs duly excepted in open Court; whereupon, all parties then announced ready for trial upon the merits, and no jury having been demanded, and all matters of fact, as well as of law, having been presented to the Court, and the Court having heard the pleadings, evidence and the argument of counsel, and before the case was closed, having given Plaintiffs leave to file their First Trial Amendment, is of the opinion and so finds that the law and the facts are with the Plaintiffs, and that they should recover as prayed for in their several Petitions.

It Is, Therefore, Ordered, Adjudged and Decreed by the Court that the Defendants, Mamie S. Hammonds and husband, O. O. Hammonds, and Intervener, T. S. Schroeder, their agents, servants, employees and legal representatives,

and the agents, servants and emplayees of each of them, be and they are hereby perpetually enjoined from drilling or attempting to drill, and from permitting to be drilled, a well for oil and gas, and from producing, permitting to be produced, and from attempting to produce oil and gas under permit granted by the Railroad Commission by order dated October 11, 1934, on application of Mrs. Mamie S. Hammonds Rule 37 Case No. 10,856 on the Oil and Gas Docket of the Railroad Commission of Texas on the following described land:

"A strip of land in the D. Sanches H. R. Survey in Gregg County, Texas, consisting of 2.21 acres, said strip being part of the land described in Plaintiff's Petition herein, and said strip more particularly described as follows:

"Beginning at a point 1019.5 ft. East of the Northwest corner of the W. L. Fuller 100 acre tract the same point being described as follows:

"A large iron stake from which a large red oak brs. S 22-30 W. a distance of 20.0 ft. The same being the NE corner of the Reppond land, to the West; at an iron pipe driven in the ground in the South line of the W. L. Fuller 67 acre tract to the North;

"Thence South a distance of 2136.3 ft. to an iron stake set in the North line of the J. W. Fuller for the S. W. corner of this survey;

"Thence East a distance of 57.29 ft. to an iron stake set for the SE corner of this survey the same also being in the N line of the W. L. Fuller tract.

"Thence North a distance of 2136.3 ft. to an iron stake set for the NE corner of this survey in the South line of the J. W. Fuller 67 acre tract;

"Thence West to the place of beginning containing 2.21 acres of land."

It Is Further Ordered by the Court that the said permit above described be and the same is hereby set aside and held for naught, and that all costs herein be adjudged against the Defendants and Intervener for which costs let execution issue;

To which judgment the Defendants Railroad Commission of Texas and its members and Mamie S. Hammonds and husband, O. O. Hammonds, and the Intervener T. S. Schroeder, in open Court duly excepted, and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas at Austin.

C. A. WHEELER,
Judge, 53rd District Court.

O. K.:
MOODY & ROBERTSON,
Attys. for Magnolia Petroleum Co.

O. K.:
SUN OIL CO.,
POWELL, WIRTZ, RAUHUT & GIDEON,

O. K. as to form:
JULIUS H. RUNGE,
Attorney for T. S. Schroeder.

(Indorsed): No. 54,769. In the 53rd District Court, Travis County, Texas. Magnolia Petroleum Company vs. Railroad Commission of Texas, et al. Judgment. Filed in the 53 District Court of Travis County, Texas, Feb. 1, 1935. Geo. H. Templin, District Clerk.

The State of Texas,
County of Travis.

I, Geo. H. Templin, Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Judgment in Cause No. 54,769 wherein Magnolia Petroleum Company is Plaintiff and Railroad Commission of Texas, et al, are Defendants, as the same appears on file and of record in this office, in Minute Book 51, Page 385.

Given under my hand and seal of office, at Austin, Texas, this the 4th day of February, A. D. 1941.

(Signed) GEO. H. TEMPLIN,
(Seal) Clerk of the District Courts of Travis Co., Texas,
By ....., Deputy.

Mr. Rauhut:

Your Honor, counsel has mentioned that there was a different location involved, which is correct, and we desire to offer a copy of the order granting the permit that was involved, and which states where it was and the grounds on which it was granted. The permit in that case was granted on both grounds of exception to the spacing rule, which is of significance, we think, in this case. If Your Honor please, this is a true copy of the order, excepting the signatures; it is a copy that is issued by the Deputy Supervisor.

The Court:

Well, counsel can look at these exhibits during the lunch hour, and if there is anything they want to take exception to then they can require you to prove it more definitely.

(Thereupon the Order referred to above was marked for identification as Plaintiff's Exhibit No. 13,—same being here set out as follows:)

197 PLAINTIFF'S EXHIBIT No. 13.

State of Texas.

Railroad Commission of Texas,
Austin.

Hearing on Application of Mamie S. Hammonds.

Case No. 10,856,—Rule 37.

Applicant:
Mrs. Mamie S. Hammonds, 623 East 18th, Oklahoma City, Oklahoma.

The re-hearing on the application of Mrs. Mamie S. Hammonds in the above styled case having been this day considered by the Railroad Commission of Texas, and it appearing to the Commission that notice of said public hearing has been given to adjacent lessees for the time and in the manner required by law, and said adjacent lessees having appeared at said public hearing, and that said applicant has offered in writing to waive any right of protest against the drilling of offset wells; and it further appearing to the Commission from satisfactory evidence adduced on said hearing held on September 14, 1934, that the drilling of said Well No. 1 on the W. L. Fuller 2.21 acres at a distance 412 feet from the North line of said W. L. Fuller tract, and midway between the East and West lines of said 2.21 acre tract, and the drilling of offset wells thereto, would not cause waste within the meaning of that term as used in the conservation statutes of the State of Texas, but would in fact prevent waste as that term is used in the statutes, and the Commission having determined that an exception to such Rule 37 is necessary in this case to prevent waste and to protect the property above described from confiscation;

Now, Therefore, It Is Hereby Ordered that the application of Mrs. Mamie S. Hammonds for permit to drill Well No. 1 as an exception to Rule 37 on the W. L. Fuller 2.21 acre tract in the Dolores Sanchez Survey, Gregg County, Texas, at the location above described be, and it is hereby granted to prevent waste and to prevent the confiscation of property.

Entered at Austin, Texas, this the 11 day of October, A. D. 1934.

The above and foregoing is a true and correct copy of an order of the Railroad Commission of Texas entered on the above date.

LATEN STANBERRY,
Chief Supervisor.

Mr. Rauhut:

On our plea that the Railroad Commission was without jurisdiction of Burford's application because of the pendency of a law suit in the District Court of Travis County, to cancel an outstanding permit at the time on this same tract, we offer in evidence certified copy of the plaintiff's petition in Case No. 53,915, Sun Oil Company vs. Railroad Commission of Texas, et al., in the 53rd District Court.

(Thereupon the Petition referred to above was marked for identification as Plaintiff's Exhibit No. 14,—same being here set out as follows:)

199 PLAINTIFF'S EXHIBIT No. 14.

In 53rd District Court, Travis County, Texas.

Sun Oil Company,
vs. No. 53,915.
Railroad Commission of Texas, et al.

To the Honorable C. A. Wheeler, Judge of said Court:

Sun Oil Company is the plaintiff. The Railroad Commission of Texas, and O. O. Hammonds and Mamie S. Hammonds are the defendants.

I.

Plaintiff is a private corporation duly and legally incorporated under and by virtue of the laws of New Jersey, with a permit to do business in Texas, and whose principal place of business in the State of Texas is at Dallas, Texas.

The Railroad Commission of Texas is composed of the Honorables Lon A. Smith, its Chairman, C. V. Terrell and Ernest O. Thompson, members, each duly and legally elected as such, and each has heretofore duly qualified. The Railroad Commission of Texas is a department of State created under and by virtue of the Constitution and laws of Texas, and its said defendant members, each, respectively, has his official place of residence at Austin, in Travis County, Texas. Among other duties, the Railroad Commission of Texas is charged by law with the enforcement of the conservation laws of Texas, and to make, promulgate and enforce rules and regulations for the conservation of petroleum oil and gas, and for the spacing and drilling, operating and producing wells therefor, preventing waste. The defendants, O. C. Hammonds and his wife, Mamie S. Hammonds reside in Oklahoma County, Oklahoma.

II.

November 26, 1919, said Railroad Commission adopted and promulgated Rule 37, as follows:

"Rule 37. No well for oil or gas shall hereafter be drilled nearer than 300 feet to any other drilling or completed well on the same or adjoining tract or farm; and no well shall be drilled nearer than 150 feet to any property line; provided, that the Commission, in order to prevent waste or to protect vested rights, will grant exceptions Permitting drilling within shorter distances than as above prescribed, upon application filed fully stating the facts, notice thereof having first been given to all adjacent lessees affected thereby."

Said Rule was in full force and effect on the dates hereinafter alleged to and including February 28, 1931.

III.

By instrument dated July 31, 1930, recorded in Volume 4, page 1, of the Gregg County, Texas, records, the owners of the fee conveyed to J. A. Reynolds an oil and gas mining lease, among other lands, on the following described tract in Gregg County, Texas, to-wit:

"A part of the D. Sanchez H R survey, situated about 8 miles NW of Longview, Texas, Beginning at a stake in the South line of the Alexander survey, being the NW corner of a tract surveyed for J. B. Harley and now owned by Bob Smith;

Thence West, passing the SW corner of the M. Irwin survey at 731 vrs, on 751.4 vrs to a corner in the South line of the said Irwin survey;

Thence South 751.4 vrs to a stake on the West bank of a branch from which a Maple brs S 77 E. 7 vrs;

Thence E 751.4 vrs to a large Sweet Gum in a branch for corner;

Thence North 751.4 vrs to the place of beginning, and containing 100 acres of land, more or less."

By instrument dated September 15, 1930, recorded in Volume 60, page 115 of the Gregg County, Texas, records, the said J. A. Reynolds assigned said lease on the lands next above described to defendant, Mamie S. Hammonds, using the identical description and field notes as quoted next hereinabove.

On December 18, 1930, by an instrument recorded in Volume 67, page 47 of the Gregg County, Texas, records, defendants O. G. Hammonds and Mamie Hammonds, first describing said original lease as hereinabove quoted as to description and field notes, assigned the same to Claude Bell and R. A. Grady, as follows, to-wit:

"In so far as it covers the E Fifty (50) acres of the above described land."

On February 28, 1931, by instrument recorded in Volume 75, page 86 of the Gregg County, Texas, records, the defendants, O. O. Hammonds and Mamie S. Hammonds, first describing said lease as first hereinabove quoted as to description and field notes, assigned the same to plaintiff, as follows, to wit:

"In so far as it covers the West Fifty (50) acres of the above described tract of land."

IV.

On February 1, 1934, upon application of the defendant, Mamie S. Hammonds theretofore filed therefor, the defendant, Railroad Commission, entered its order in Rule 37, Case 10,856, on the Oil & Gas Docket of the Railroad Commission of Texas, granting to defendant, Mamie S. Hammonds, a permit to drill a well for oil and gas on a strip of land midway between the East and West lines of said 100 acre tract and extending from the North to the South lines thereof, being approximately 50 feet wide East and West by approximately 2100 feet long North and South, said well to be spaced on said strip 330' from the North line and midway between the East and West lines of said strip, defendants, Hammonds, claiming that, by actual measurement between its four corners, there is contained in said tract as originally leased as hereinbefore alleged, 102.81 acres of land, and that the 2.81 acre strip in the center of said tract lies West of the 50 acres first assigned by them to Bell and Graddy, and East of the 50 acres assigned by them to plaintiff, all as hereinbefore alleged, and that they are the owners of the leasehold estate in, on and to the same, and that same was not included in their assignment to Bell and Graddy nor in their assignment to this plaintiff.

This plaintiff would further show that said order of the defendant, Commission, was entered by the Commission without any sort of notice to the plaintiff, and without any sort of notice to any adjacent leaseholder to the North, East and South of said claimed strip, and without a hearing on said application.

Plaintiff would further show that Rule 37, as adopted, amended and promulgated by the defendant, Commission, and which was in full force and effect on February 1, 1934, is as follows, to-wit:

"Rule 37, adopted November 26, 1919, is hereby amended, in so far as it applies to the East Texas Field, so as to hereafter read as follows: no well shall hereafter be drilled for oil or gas at any point less than six hundred and sixty (660) feet from any drilling or completed well; and no well shall hereafter be drilled for oil or gas at any point less than 330 feet from any property or division line; provided, however, the Commission, in order to prevent waste or to protect vested rights, will, after hearing, grant exceptions permitting drilling within a less or shorter distance than hereinabove prescribed, upon application duly filed fully stating the facts, notice of such application and hearing having been first given to all adjacent lessees affected thereby, provided, that if all adjacent lessees affected thereby waive in writing, notice of hearing on or objection to the granting of said application, the Commission may proceed to determine such application without hearing."

Plaintiff would further show that said order complained of herein was entered by the defendant, Commission, without notice and hearing, and that no adjacent lessee affected thereby waived in writing or otherwise, such notice and hearing, and no adjacent lessee affected thereby waived objections to the granting of such permit or application.

V.

Plaintiff brings this suit as an appeal from said order of the defendant, Commission, under Article 6049c, Revised Civil Statutes of Texas.

VI.

Plaintiff says that the order of the defendant, Commission, complained of is invalid for the reasons following, to-wit:

1. The land as originally leased by the fee owners on July 31, 1930, was rectangular in shape, was in one contiguous body, and was susceptible of development for oil and gas as a whole in strict conformity with said Rule 37, and with the conservation laws of the State of Texas, then in force, and neither the fee owners nor their lessee, nor any assignee of their lessee, had, or thereafter acquired any vested right to develop the same for oil and gas except in conformity with Rule 37, and the conservation laws of Texas.

2. That if said original 100 acre tract actually contains 102.81 acres, which is not admitted, but is expressly denied by the plaintiff, by their assignment of the East 50 acres of said tract to Bell and Graddy, as aforesaid, and by their assignment of the West 50 acres of said tract to the plaintiff, as aforesaid, the defendant, Hammonds, waived and divested themselves of all and every vested right to develop said land or any part thereof for oil and gas, because said claimed strip 50 feet East and West by 2100 feet North and South is not capable of development in conformity with Rule 37, or under any exception to said Rule, and with the conservation laws of Texas; that defendants, Hammonds, partitioned said land in view of Rule 37 and of the conservation laws of Texas, and are now estopped from drilling said strip for oil and gas, and from claiming any vested right to drill same for said purpose.

3. Because said order of the defendant, Commission, granting the defendants, Hammonds, a permit to drill said well on said strip, as aforesaid, was granted by said Commission without notice to this plaintiff, and without notice to any adjacent lessee affected thereby, and without a hearing, and without the introduction of any evidence, and without any adjacent lessee having waived objections

thereto, notice thereof, or hearing thereon in writing or otherwise.

4. Because said order is unreasonable, arbitrary, and discriminatory and should be annulled, in that said order permits the defendants, Hammonds, to drill a well for oil and gas on a 2.81 acre narrow strip of land 50 feet wide and 2100 feet long, and within 25 feet of plaintiff's East line; that if drilled, a location 50 feet to the East, and another 50 feet to the West of said location will be forced thereby, or three wells on a line 100 feet in length, which said wells, thus grouped, will cause a low pressure area when produced, and will cause great waste of oil and gas and of pool energy as will be hereinafter shown, all in violation of the letter and spirit of the conservation laws of Texas, and in direct contravention of Rule 37 of the defendant, Commission, and enables the defendants, Hammonds, to unfairly compete with this plaintiff in producing oil and gas from said leasehold estate, in that plaintiff is prohibited by said Rule 37 from drilling its land to a greater density than one well to each ten acres of land

VII.

Plaintiff says that it purchased the oil and gas mining lease on the West 50 acres of said original tract from the defendants, Hammonds, and that the defendants, Hammonds, sold said leasehold estate to this plaintiff, in view of the conservation laws of Texas, and in view of said Rule 37, then in force, and upon the implied and express agreement, representation and assurances, as expressed in said assignment, that the distances between the four corners of said original tract, each, respectively, was 751.4 varas, and that the courses from and to the beginning corner were due West, South, East and North, respectively, and that the West 50 acres of said original tract so assigned to plaintiff, was and would be contiguous to the

East 50 acres of said tract theretofore assigned to the said Bell and Graddy, and that the West line of said West 50 acres would be coincident with the West line of said original 100 acre tract, and with the implied assurance that the four lines of plaintiff's said estate thus assigned would never be offset by wells drilled upon said original tract closer to plaintiff's said property lines than 150 feet, and that plaintiff would never be required to drill a well, and that no well would be drilled, closer than 150 feet to the dividing line between the East and West 50 acres of said original 100 acre tract; that in reliance thereon, and in perfect good faith, plaintiff has developed its leasehold estate along its East boundary line in consonance with said Rule 37; that in September, 1931, defendant, Commission, amended its said Rule 37 so as to prohibit drilling wells for oil and gas in the East Texas Field at a closer distance than 330 feet from property lines and 660 feet from drilling or completed wells, and this plaintiff has developed its said leasehold estate along its East line in consonance with such amended Rule, spacing its well full 330 feet West from its East line at a cost of approximately $15,000.00 for each well so drilled, and in full reliance upon said implied agreement and assurance of the said defendants, Hammonds; that if the defendants, Hammonds, shall be permitted to drill said claimed strip of land for oil and gas, plaintiff will be required to offset each said well so drilled by an equidistant West offset, unnecessary to a proper development of plaintiff's leasehold estate but for such drilling by defendants, Hammonds, to its great and irreparable injury. Each such offset well will cost approximately $15,000.00 and defendants, Hammonds, being non-residents of the State, a moneyed judgment cannot be had against them or either of them because no personal service can be had upon them in Texas, and plaintiff has no remedy in law; that plaintiff cannot obviate the injury to it by drilling such offset wells in that the wells now drilled on plaintiff's said lease are adequate to drain all of

the recoverable oil in and under such area, and by grouping wells along said narrow strip will augment the injuries to plaintiff as will be hereinafter alleged, and will occasion great waste of oil and pool energy as will be shown, and that its right to offset such wells is not an adequate remedy, and plaintiff has no adequate remedy in law.

VIII.

Plaintiff says that by reason of the facts alleged, defendants, Hammonds, are estopped from drilling said strip of land; that the wells now on said 100 acre tract are sufficient to drain all of the oil and gas from and under said tract in the area where defendants, Hammonds, seek to drill, and that the location complained of is not forced; that if said strip of land actually exists on the ground as additional to the East and West 50 acres of said original tract, and if the same was not, as a matter of fact and law, included in said assignments to Bell & Graddy and to plaintiff, this plaintiff here now offers to pay the defendants, Hammonds, the same per acre consideration for said 2.81 acre strip as was paid by plaintiff to the defendants, Hammonds, for the West 50 acres of said original tract, and here now proposes and offers in good faith to do full equity to the defendants, Hammonds, to the end that the injuries to plaintiff here complained of may be obviated, and its property and the State's natural resource be conserved.

IX.

Plaintiff says that the said original tract of land, including the strip of land here involved, are located in what is designated by the defendant, Commission, as the East Texas Field; that the entire original tract is underlaid with a woodbine sand which is saturated with oil and

gas, and which constitutes a common oil pool; that the lifting force which forces the oil through said sands, into and through wells drilled therein is hydrostatic pressure vertically and from the Westward on the western edge of said pool; that the lands here involved are over the Eastern portion of said pool; that if said well is permitted to be drilled by the defendant, Hammonds, an equidistant offset well will be forced to the east and west thereof, thus forcing the drilling of three wells along a line 100 feet in length, and when produced will occasion a low pressure area at such point, to equalize the pressure in and about such area, oil will be forced toward such point from surrounding high pressure areas at a great sacrifice and loss of energy. With lowering of pressures gas wastage will start, which when exhausted or diminished increases the viscosity of the crude, thus leaving great quantities of oil in place in such structure; that one well at such location is amply sufficient to drain fifteen acres of recoverable oil, and to drain all of the recoverable oil in and under fifteen acres of land; that the three wells located as herein alleged will eventually exhaust great and inestimable quantities of energy from, in and under plaintiff's leasehold estate, and from the lands lying East thereof, and will leave great and inestimable quantities of oil in place thereunder, which can never thereafter be recovered, to the great and inestimable loss and injury to plaintiff and to the State, and plaintiff has no remedy at law to prevent it.

X.

Plaintiff says that the injuries herein alleged and complained of cannot be prevented by drilling an equidistant offset to defendants, Hammonds', said location because one well is sufficient, in said area, to drain all of the recoverable oil from and under fifteen acres of land; that an equidistant offset well on plaintiff's land West from said

location cannot prevent the defendants, Hammonds', complained of well located as it is proposed and permitted, 25 feet East from Plaintiff's East line, from draining a great and inestimable quantity of oil and gas from plaintiff's said land, title to which was acquired, as aforesaid, from the defendants, Hammonds, for a valuable consideration, and the defendants, Hammonds, warranted title to the same by general warranty in writing; that because of the migratory nature of oil passing from high to low pressure structure, it is impossible to know or to approximate with reasonable certainty the amount of oil in barrels that will be drawn from plaintiff's leasehold estate, but the plaintiff says that it will be great and inestimable, and that plaintiff has no remedy in law to prevent it; that this plaintiff here now pleads such general warranty of the defendants, Hammonds, as expressed in their assignment of said leasehold estate to this plaintiff in estoppel of their claim or right to drill said narrow strip; that by reason of all of the facts hereinbefore alleged the action of the defendants, Hammonds, in drilling and in attempting to drill said well, and in developing and attempting to develop said long narrow strip of land for oil and gas, is a fraud upon this plaintiff, which should be restrained in equity, plaintiff being without remedy in law as hereinbefore alleged; that by drilling an equidistant West offset to said complained of location, plaintiff will but augment the injuries complained of, in that the group of wells drilled at such close proximity one to the other will produce a low pressure area as hereinbefore alleged, which, for the reasons alleged, will efentuate great waste of petroleum oil that would otherwise be recovered by the plaintiff and the lessees to the East and North, because of the exhaustion of pool energy as aforesaid quantities of oil will be left in place with no propelling and lifting force to remove it, and can never thereafter be recovered, to the great and inestimable injury and damage to this plaintiff. Upon discovery that the defendant, Commission, had

granted said complained of permit, plaintiff immediately thereupn filed its motion for rehearing in said cause before said Commission, but that said motion was, in all things, overruled. Plaintiff having exhausted its remedy without avail is without remedy in law to prevent the injuries complained of.

Wherefore, plaintiff prays that a temporary restraining order issue herein restraining the defendants, O. O. Hammonds and Mamie S. Hammonds, their agents, servants, employees, contractors and legal representatives from drilling and from attempting to drill and from permitting the drilling of such well on said strip of land, no well having been begun at said location to this date; that this cause be set for hearing by the Court on a day certain, and that the defendants be notified thereof and cited in terms of law to appear and show cause why temporary injunction should not issue, and that on such hearing, temporary injunction issue so restraining and enjoining the defendants, Hammonds, their agents, servants, employees, contractors and legal representatives; that the defendants and each of them be cited in terms of law to appear and answer herein, and that upon trial hereof, plaintiff have judgment decreeing said 2.81 acre strip to be a part and parcel of plaintiff's leasehold estate as assigned to it, and in any event, that the complained of order of the defendant, Railroad Commission, be in all things annulled, canceled and held to be invalid and of no force and effect, and that the temporary injunction be made permanent against the defendants, Hammonds, their agents, servants, employees, contractors and legal representatives; that if it shall be determined that said 2.81 acre strip exists and that same was not included in the assignment to plaintiff of the leasehold estate in, on and to the West 50 acres of said original tract, and then and in that event, that defendants, Hammonds, be required to accept from plaintiff the same per acre consideration therefor as was paid and acccepted

for the said West 50 acres of said original tract, the plaintiff, in any event, being ready, willing, and hereby proposing to do full equity to and by the defendants, Hammonds, and that all title and claim of the defendants, Hammonds, in and to said 2.81 acre strip be divested out of them and each of them and that title in and to the leasehold estate in, on and to the same be vested in this plaintiff, for all costs of suit, and for full relief in law and equity.

SUN OIL COMPANY,
By. T. L. FOSTER,
J. W. TIMMINS,
BEN H. POWELL,
J. A. RAUHUT,
E. R. PEDIGO,
Plaintiff's attorneys.

The State of Texas,
County of Travis.

Before me, the undersigned authority in and for said State and County, on this day personally appeared E. R. Pedigo, an attorney for the plaintiff, who, being first by me duly sworn, on his oath says that he is an attorney for the plaintiff, Sun Oil Company; that he is authorized and empowered to make this affidavit; that he has read the within and foregoing petition, and that the allegations of fact therein contained are true.

(Signed) E. R. PEDIGO.

Sworn to and subscribed before me this the 30th day of May, A. D. 1934.

(Signed) R. W. TOBIN,
(Seal) Notary Public, Travis County, Texas.

At Chambers May 30, 1934.

The within and foregoing petition having been presented to and heard by the judge of the District Court in and for

the Fifty Third (53rd) Judicial District of Texas, in and for Travis County, Texas, at chambers, this 30th day of May, A. D. 1934, and it appearing to him from the facts stated therein that the applicant is entitled to a temporary restraining order, that the same is within complainant's allegations and prayer, that the allegations of fact contained in said petition are duly verified by one qualified and authorized thereto, that delay will not injure either party and that justice may be subserved thereby, it is ordered that the clerk of this Court issue a temporary restraining order, operative until and pending the hearing below ordered, restraining the defendants, O. O. Hammonds and Mamie S. Hammonds, their agents, servants, employees, contractors and legal representatives, and the agents, servants, employees, contractors, and legal representatives of each said defendant, from drilling, attempting to drill and from permitting to be drilled, a well for oil and gas on the strip of land consisting of approximately 2.81 acres fully described in complainant's pleading, upon the complainant executing in behalf of the defendants a bond in the sum of $1000.00, conditioned as the law requires. The clerk shall quote this fiat and embody such order in a writ, which will also require the defendants to appear in the Court room of the Fifty Third (53rd) District Court of Travis County, Texas, on the 2nd day of July, 1934, to show cause why temporary injunction should not be granted upon such petition effective until final decree in such suit. Such writ shall be served by the sheriff, or any constable.

(Signed) C. A. WHEELER,
Judge 53rd District Court
Travis County.

Indorsed: No. 53,915—Sun Oil Company vs. Railroad Commission of Texas, et al—53rd District Court, Travis County, Texas—For Injunction—Plaintiff's Original Petition—Filed in the 53rd District Court of Travis County,

Texas, May 30, 1934, Geo. H. Templin, District Clerk, by Geo. W. Bickler, Deputy.

The State of Texas,
County of Travis.

I, Geo. H. Templin, Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Plaintiff's Original Petition In Cause No. 53,915, wherein Sun Oil Company is Plaintiff and Railroad Commission of Texas, et al are Defendants, as the same appears on file in this office.

Given under my hand and seal of office, at Austin, Texas, this the 4th day of Feb., 1941.

GEO. H. TEMPLIN,
(Seal) Clerk, District Courts, Travis County, Texas.
By .....,
Deputy.

Mr. Rauhut:

To identify the location involved in that suit, we will offer a copy of the order of the Railroad Commission granting the permit that is involved in that suit, for the information of the Court.

Mr. Cale:

We have no objection.

(Thereupon the Order referred to above was marked for identification as Plaintiff's Exhibit No. 15,—same being here set out as follows):

218 PLAINTIFF'S EXHIBIT No. 15.

State of Texas

Railroad Commission of Texas
Austin

Case No. 10,856

Rule 37

#1 W. L. Fuller 2.81 ac Sanches Sur., Gregg Co.

Applicant: Mrs. Mamie S. Hammonds, 623 East 18th St., Oklahoma City, Okla.

Austin, Texas, Feb. 1, 1934.

The application of Mrs. Mamie S. Hammonds for an exception under the provisions of Rule 37 coming on to be heard on this the first day of February, 1934, by the Railroad Commission of Texas, and it appearing that the petition shows good cause; that no injustice will be done by the granting of such exception, and that same should be granted for the protection of vested rights:

Now, Therefore, It Is Ordered that the application of Mrs. Mamie S. Hammonds for an exception under the provisions of Rule 37, and a permit to drill her well #1 W. L. Fuller 2.81 ac D. Sanches Survey, Gregg County, Texas, is hereby approved and the applicant is granted permission to drill her well #1; as shown on plat submitted:

330 feet south of the north line and midway between the east and west lines of said tract.

It is expressly provided and made a part of this order that no other well will ever be drilled on this tract.

It is further provided that if there is a building, structure or other object of any kind which would constitute a fire hazard less than 150 feet to location described herein same must be removed from the premises before the well covered by this permit is drilled into any pay formation.

The above and foregoing is a true and correct copy of an order of the Commission entered on this the 1st day of February, 1934.

R. D. PARKER,
Chief Supervisor.

Mr. Rauhut:

Here is the final judgment entered in that case on November 29, 1939.

(Thereupon the Judgment referred to above was marked for identification as Plaintiff's Exhibit No. 16,--same being here set out as follows):

219 PLAINTIFF'S EXHIBIT No. 16.

In the 53rd District Court of Travis County, November 29, 1939.

53,915 Sun Oil Company, Et Al vs. Railroad Commission, Et Al.

On this 29th day of November 1939, pursuant to regular setting and at a regular term of Court came on to be heard the above numbered and entitled cause, and came Plaintiff Sun Oil Company, Intervener Magnolia Petroleum Company, Defendants Railroad Commission of

Texas and the members thereof, and Defendants Mamie S. Hammonds, O. O. Hammonds and Intervener T. S. Schroeder, all by their respective attorneys of record, and announced ready for trial The Court having heretofore overruled the demurrers and exceptions contained in the respective pleadings of all parties by order entered herein on July 19, 1934, and a jury being waived, the Court proceeded to hear the evidence and argument of counsel, and it being shown by undisputed evidence that the order of the Railroad Commission granting permit herein complained of was entered without notice and the holding of a hearing as required by law, the Court finds Plaintiff Sun Oil Company and Intervener Magnolia Petroleum Company are entitled to judgment as a matter of law, and that it is not necessary for the Court to determine any other issue in this case.

It Is Therefore Ordered, Adjudged And Decreed that Plaintiff Sun Oil Company and Intervener Magnolia Petroleum Company be and they are each hereby awarded judgment annulling that certain order entered by the Railroad Commission of Texas in Rule 37 Case No. 10856 on its Oil and Gas Docket, dated February 1, 1934, granting Mamie S. Hammonds permit to drill and operate well No. 1 at a location 330 feet south of the North line and midway between the East and West lines of a parcel of land described in said order as 2.81 acres, being a part of the W. L. Fuller fee tract of 100 acres, more or less, situated in the Dolores Sanches Survey, Gregg County, Texas, more fully described in Volume 4, page 1, of the Deed Records of Gregg County, Texas, to which reference is here made for further description, said 2.81 acres of land being located between Sun Oil Company's lease on the west 50 acres of said Fuller tract and Magnolia Petroleum Company's lease on the east 50 acres of said Fuller tract; and said order of the railroad Commission of Texas is hereby canceled, set aside and decreed wholly null and void.

It Is Further Ordered, Adjudged And Decreed that Defendants Mamie S. Hammonds, O. C. Hammonds and Intervener T. S. Schroeder, and each of them, their agents, servants, employees, contractors and legal representatives, be and they are perpetually enjoined from drilling or attempting to drill a well for oil and gas under the permit order herein annulled, and from producing or attempting to produce oil and gas from such well.

It Is Further Ordered, Adjudged And Decreed That this judgment be and it is hereby entered without prejudice to the right of any of the parties herein mentioned to apply to the Railroad Commission of Texas for other permits to drill oil and gas wells at such places on the tract of land above mentioned as they may desire.

All costs herein are taxed against the Defendants and Intervener T. S. Schroeder, for which execution may issue.

RALPH W. YARBOROUGH,
Judge Presiding.

O. K. as to form:
F. L. KUYKENDALL,
FRED P. BRONSON,
JULIUS H. RUNGE,
Atty. for T. S. Schroeder.
DAN MOODY,
Atty. for Magnolia.
JAMES P. HART,
Assistant Attorney General.

(Indorsed): No. 53,915. Sun Oil Company, et al. vs. Railroad Commission, et al. In the 53rd District Court of Travis County, Texas. Final Judgment. Filed in the 53 District Court of Travis County, Texas, Nov. 29, 1939.

Geo. H. Templin, District Clerk. By Jas. T. Johnson, Deputy.

The State of Texas,
County of Travis.

I, Geo. H. Templin, Clerk of the District Courts, within and for the State and County aforesaid, do hereby certify that the within and foregoing is a true and correct copy of Final Judgment in Cause No. 53,915 wherein Sun Oil Company, et al, are Plaintiffs and Railroad Commission, et al, are Defendants as the same appears on file and of record in this office; in Minute Book 72, Page 304.

Given under my hand and seal of office, at Austin, Texas, this the 4th day of February, A. D. 1941.

(Signed) GEO. H. TEMPLIN,
(Seal) Clerk of the District Courts of
Travis Co., Texas,
By ....., Deputy.

The Court:
Anything further, counsel?

Mr. Rauhut:
I believe we are just about through with the record evidence here.

The Court:
Well, I will recess now until two o'clock.

(Thereupon, at 11:55 o'clock a. m. a recess was taken until 2:00 o'clock p. m. of the same day.)

Wednesday, February 5, 1941.

Afternoon Session.

Mr. Rauhut:

During the noon recess we dictated another stipulation that we would like to have read to the Court by the reporter.

(Thereupon the reporter read the following stipulation, which is herewith made a part of this record.)

224 STIPULATION.

It is stipulated by all parties that Mamie S. Hammonds and husband, O. O. Hammonds, assigned the oil and gas lease on the strip involved in the Burford Application, to T. S. Schroeder on May 18, 1934, and that T. S. Schroeder in turn assigned the lease on what we refer to as the strip of 2.33 acres to G. E. Burford on February 21, 1938, and that G. E. Burford in turn executed an assignment of the lease on the strip to X. Y. Z. Oil and Gas Company on April 3, 1939, which assignment was filed for record in Gregg County Deed Records on April 22, 1939.

It is further agreed that G. E. Burford is president of X. Y. Z. Oil & Gas Company, not only at this time but also was during the entire year of 1939.

Mr. Rauhut:

We would like to call as our first witness, Major J. D. Copeland, Jr.

225 J. D. COPELAND, JR., called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Rauhut:

Q. Will you state your name?

A. J. D. Copeland, Jr.

Q. Are you connected with the State Government at this time in any official capacity?

A. No, sir.

Q. Are you connected with the National Guard of the State of Texas?

A. It used to be the National Guard. It is now the Army of The United States.

Q. What is your position in that?

The Court:

What is the materiality of that?

Mr. Rauhut:

Merely to acquaint the Court with the veracity of this witness.

A. Major in the Quartermaster Corps.

Q. Have you ever been employed by the Railroad Commission of Texas?

A. Yes, sir.

Q. In what capacity were you last employed by the Railroad Commission of Texas?

A. Examiner in the Oil and Gas Division.

Q. Did you conduct hearings in that capacity?

A. Yes, sir.

Q. On applications for permits to drill wells in exception to Rule 37 in the East Texas Field?

A. Yes, sir.

Q. In that capacity did you conduct hearings on the application of G. E. Burford for a permit to drill wells 1 to 4 on the W. E. Fuller 2.33-acre tract in the Sanchez survey in Gregg County, Texas?

A. Yes, sir.

Q. Do you recognize this file I hand you here?

A. Yes, sir.

Q. Is that the Commission's file on the G. E. Burford application to drill wells 1 to 4 on the W. E. Fuller Railroad Commission case No. 26868? The papers in there bear the official file marks of the Oil and Gas Division?

Mr. Cale:

There were several of those applications. I cannot be certain what he is talking about unless he refers to the date, because, there were three in all.

Mr. Rauhut:

I borrowed this file from the Attorney General. All three applications are in the same file and all the orders of the Commission with respect to it.

The Court:

Let's see what the witness will say about it.

A. What is the question?

Q. Is that the Commission's files?

The Court:

Do you contemplate putting that whole file in evidence?

Mr. Rauhut:

No, sir. I have already introduced a great many of the instruments, and I do not contemplate putting them all in.

The Court:
Well, what is the use of asking him about the whole file?

Mr. Rauhut:
Because it will tie in with questicns I will ask him with reference to the manner in which the Railroad Commission passed on this case.

The Court:
Why don't you come to your point?

Mr. Rauhut:
All right, Your Honor.

Q. I will also hand you here three papers,—the transcripts of hearings. Do you recognize those papers—those transcripts.

The Court:
The Court has not time to sit here while he deliberates whether he knows or not. Show them to the witness. Have you done anything about those?
A. Yes, sir; if I have a chance to check to see what I think they are.

The Court:
You don't have to check each one, do you?
A. I believe I would.

Q. Are they transcripts of hearings on the three hearings on the Burford applications for permits to drill wells 1 to 4 on the Fuller tract?
A. They are apparently copies.
Q. They are certified, and each signed by the official reporter.

A. That is what I could not find—yes, they are; they are certified at the back.

Q. What are the date of the three hearings held on the Burford applications?

A. One hearing held on August 15, 1938; a hearing held on January 31, 1939; a hearing held May 19, 1939.

Q. Did you conduct each of those hearings as the Examiner?

A. I conducted two of them, I believe; and partly conducted the third one.

Q. What do you mean, partly conducted that third one?

A. I mean there were two examiners sitting in on one of the hearings.

Q. Which one was that?

A. It was the hearing of January 31, 1939.

Q. Now, was any member of the Railroad Commission of Texas present at any one of those hearings?

A. No, sir.

Q. Did you have a reporter of the Oil and Gas Division there to report the hearings—to make a stenographic report of the hearings?

A. Yes, sir.

Q. Who is that lady?

A. Mrs. Louise Kirk.

Q. Will you state what procedure was employed after you had conducted the hearing, and after you conducted these hearings, in presenting the matter to the Railroad Commission of Texas for decision?

A. After the hearing is concluded, it and other hearings that were held that day, a memorandum was made to each application.

Q. By the examiner?

A. By the examiner; and then at some later date, it with others was taken before the Commission in conference for their decisions.

A. You say "it with others." You mean the files of the Commission on various pending hearings?

A. I mean "it" in the sense you take any one.

Q. The file on any one application?

A. That is right.

Q. You would take the file into them and not merely the memorandum?

A. That is correct.

Q. Now, would you take these in one at a time or a great number of these pending files?

A. There would be several.

Q. What did you do when you took them in to the Commission, and how were they handled by the Railroad Commission? Was there a conference with the Railroad Commission, or what was the procedure?

Mr. Kuykendall:

We believe the witness should confine his remarks to this particular application, and not to any others not involved in this case.

The Court:

I assume this one is covered.

A. The file which is contained in the jacket contains all the papers pertaining to the case, with the memorandum by the examiner, and was laid before the Commission with the plat open for the Commission to look at.

Q. Were the transcripts of testimony—were the stenographic notes of the hearing transcribed at the time of the conference that was held on these Burford applications?

Mr. Cale:

The witness has not testified he knew when the conference was held.

Q. Were you present when the Burford application was presented to the Commission in conference?

A. I believe that I was.

Q. Was it the custom for the man who made the memorandum to take the file in to the Commission and discuss it with them?

A. Yes, sir.

Q. Did you make a memorandum on the Burford application on each of these three hearings?

A. I believe that I did.

Q. Now, have you checked those transcripts to see whether the testimony that was adduced at the hearings, say the second hearing and the third hearing, were transcribed at the time the Commission entered its orders disposing of the application or at the time of the conference.

Mr. Hart:

I think he is asking him to testify from hearsay, and we object to it on that ground. He apparently wants him to look at a certificate and testify from that.

Mr. Rauhut:

I will change the question.

Q. Did you attend the conference with the Railroad Commission on the Burford application on the occasion when they granted him a permit to drill four wells?

A. That was on the hearing of May 19?

Q. Yes, sir.

A. I was present.

Q. And did you have with you to present to the Commission anything besides the files? Did you have with you the transcript of the testimony that was adduced at the hearing on May 19, 1939?

A. The transcript of the hearing of May 19, 1939, I don't believe was with the file when the Commission acted on it.

Q. The date of the certificate in the transcript is what date?

A. June 9, 1939.

Q. What was the date of the Commission's order granting the oil permits?

A. My recollection is June 2. Let me see.

Q. Check it, please, sir.

A. June 2, 1939.

Q. Does that in any way confirm your statement that the transcript was not there at the time of the conference?

A. I don't believe it could be at the conference because it was not written until afterwards.

Q. Now, at the conference what was the practice of the Commissioners as to how they indicated approval or disapproval?

A. They initialed the memorandum either granting or denying.

Q. Does that file show which Commissioners initialed the memorandum, or whether they did initial the memorandum in this case?

A. It would. Yes, sir; there are two initials granting it.

Q. Which ones?

A. Smith and Sadler.

Q. Is that your memorandum of the May 19, 1939, hearing?

A. Yes, sir.

Mr. Rauhut:

We offer this in evidence.

(Thereupon the memorandum referred to was marked for identification as Plaintiff's Exhibit No. 17, same being herewith set out as follows:)

232 PLAINTIFF'S EXHIBIT No. 17.

Case No. 26,868. Case No. .....

Applicant:
G. E. Burford, 4436 Fairfax Ave., Dallas, Texas.

Protestant:
Sun Oil Co.,
Atlantic Refining Co.,
Standard Oil Co. of Kansas & J. G. Beard.

Well Description:
1, 2, 3, 4 W. L. Fuller 2.33 ac. D. Sanchez Survey, Gregg Co.

Attorney for Applicant:
Gordon Griffin.

Attorney for Protestant:
Martin Row,
J. A. Rauhut,
A. S. Rhea,
J. W. Stayton, by letter.

Application filed: .....

Notice issued: May 6, 1939.

Date of Hearing: May 19, 1939.

Examiner's Memorandum.

June 1, 1939.

This lease is located in the East Texas field where the spacing rule is 330 feet from lease lines and 660 feet between wells.

The Commission in Case 26,868 on March 25, 1939, granted G. E. Burford permission to drill well No. 2 on this lease and denied the application for wells Nos. 1, 3, and 4. On the 29th day of April, 1939, the Commission granted applicant's motion for rehearing on wells Nos. 1, 3, and 4 and also granted protestants' motion for rehearing on well No. 2. Both hearings were held on May 19th, at which time the Examiner limited both parties to the requests granted by the Commission. All the information in the prior files should be considered.

Applicant reintroduced his testimony given at the prior hearing which shows the various areas of his lease which according to his contention are not being adequately drained by wells on his tract or on the adjacent tracts at this time. This tract is a subdivision of a 100 acre tract and it was shown that the entire 100 acre tract is entitled to additional wells. Therefore the applicant contended that under the Century case, since a part of his tract was within the area not being adequately drained the wells could be spaced on his portion.

Protestants at the rehearing put on a witness who testified in regard to drainage of the entire tract and testified that this would make close spacing of wells and thereby create a low pressure area and thereby create waste. On cross examination by the Examiner, it was brought out that the same spacing is already in effect on the leases on each side of this tract and that this would not decrease the distances between wells but would bring about a more uniform spacing of the entire 100 acres. The Sun Oil Company did not submit their witness to cross examination by the applicant for the reason that applicant offered no witnesses at the rehearing. Protestants contended that the wells could be spaced on the main body of the 100 acres; however, there are now no applications pending at this time except the Magnolia's application for a direct offset to this No. 2 well.

Thus the Commission has at this time pending before it the disposition of all four wells as originally asked for by the applicant Burford. The spacing desired is:

No. 1—330 feet S. of N. Line; Midway between E. & W. Lines;

No. 2—489 feet S. of location #1; midway between E. & W. Lines;

No. 3—489 feet S. of location #2; midway between E. & W. Lines;

No. 4—330 feet N. of S. Line; midway between E. & W. Lines.

Respectfully submitted,

(Signed) J. D. COPELAND, JR.,
(J. D. Copeland, Jr.),
Examiner.

jdc: lk.

Application:
Granted S. 6-25 H.
Denied .....

Q Were these memoranda initialed in the conference while you were there?

A Yes, sir.

Q How long did those conferences require as to a particular application? How much time did the Railroad Commission spend in considering these files?

Mr. Cale:

This witness is not qualified to tell how much time the conference took. He can tell how long he was there.

Mr. Rauhut:
Ail right.

Q. Mr. Copeland, you have already stated that you took the file in to the Commission for the conference. When you got through with them did you take the files out?

A. That was the custom, yes, sir.

Q. And returned them to your office?

A. Not to my office, but to the files.

Q. At the time you would be taking them back from the conference there was no signed order, but merely initials on the memorandum indicating what kind of order they wish drawn?

A. That is correct.

Q. The order would be prepared later and sent back to them for their signature?

A. Yes, sir.

The Court:
Can't you get this without so much circumlocution? After you held these hearings you took these papers in there and talked to the Commission about it, and made them your recommendation, and they either accepted it or rejected it. Is that what happened?

A. No, sir; that is not what happened.

The Court:
Then tell what did happen.

A. You are correct in everything except that the Examiner did not make a recommendation for or against any permit. They merely held a hearing and made a brief synopsis of the hearing in a memorandum, neither recommending it be granted or recommending it be denied. We did that prior to 1935. Since that time, they did not allow us to recommend.

The Court:

How did they arrive at their decision?

A. They based their decisions on the maps and their knowledge of the field, and any papers that might be within the files.

The Court:

All right. Anything else?

Mr. Rauhut:

A. Yes, sir.

Q. You remained there until the end of the conference and took the file with you?

A. That is my recollection.

Q. Did the reporter come in and read the testimony from her notes during the conference?

A. On this particular case?

Q. Yes, sir.

A. Not to my knowledge.

Q. How long did the conference last? How long would you estimate it lasted with reference to this application?

A. That would be rather hard to say, but the conference lasted some two or three hours. With all the other applications you could not definitely say now how long each took.

Q. Can you say approximately how long they usually spend on an application? Give us a safe estimate of what it would be.

A. Ten to thirty or forty minutes.

Mr. Cale:

We object to that.

The Court:

Objection is overruled

Q. Ten to thirty or forty minutes is your answer?

A. Yes, sir.

Q. Now, the memorandum that the Commission required the Examiner to make, and that you made in reference to the Burford hearing, was that a public document open to inspection of everybody prior to the time the Commission made its decision?

A. The Commission made an order that it was not to be.

Q. In other words, that was kept private until the Commission had acted?

A. It was kept in the files and no one was privileged to read it except members of the Commission.

Q. Members of the Commission and its employees?

A. Yes, sir.

Q. Then it was not submitted to the attorneys for the interested parties in the hearings for suggestions, revision or criticism by them?

A. Not to my knowledge.

Q. You did not submit your memorandum on this Burford application to anybody for their approval, or correction, or suggestion?

A. None other than the Commissioners.

Q. Did you undertake to state all the evidence in your memorandum?

A. I did not.

Q. With reference to objections to testimony, and the admission or exclusion of testimony at the hearings, did you have any procedure at those hearings for the preparation of Bills of Exception to present the objections to the Commission for their ruling?

A. No, sir.

Q. And when objections were made, they were merely noted in the transcript of the evidence there?

A. That is correct.

Q. And did not appear in your memorandum?

A. No, sir.

Q. The Commission would not know what the objections were then without reading the transcript, is that the situation?

A. I don't think they would.

Q. Was there any practice on the part of the Commission, or did it in this case, do any such thing as to make and file written findings of fact as to their reasons for granting a particular permit?

A. I have seen none.

Q. They had no such factors other than what they decided in their order granting the permit?

A. That is all I have seen.

Mr. Rauhut:

That is all.

Cross Examination.

Questions by Mr. Cale:

Q. Major Copeland, refer to your files with reference to the first application that was made on these, with reference to wells Nos. 1, 2, 3, and 4 on the W. L. Fuller and G. E. Burford 2.33-acre tract. I want to know if you construe that first application was filed June 18, 1938, and if not, what date?

A. I have an application apparently filed June 18, 1938.

Q. I will ask you to consult the transcript that you have there, if you do have one, and what date is the date of the first transcript with reference to the application filed on June 18, 1938.

A. You mean the date the transcript was prepared?

Q. Yes, sir.

A. Apparently it was prepared on April 22, 1939.

Q. What was the date, if it indicates on the front, that the hearing was held?

A. August 15, 1938.

Q. Will you look in there and see if the files show or indicates the date the order was entered on that application? You said you held a hearing. Now, what date was the order entered?

Mr. Rauhut:

It has been agreed that the order was entered on September 21, 1938.

Mr. Cale:

All right.

Q. The second application was filed January 9, 1939, upon wells 1, 2, 3, and 4, wasn't it?

A. Yes, sir.

Q. Now, the hearing was held January 31, 1939, was it not?

A. There was a hearing held on that date on that application, yes, sir.

Q. That record was transcribed on the 21st of April, 1939, wasn't it, according to the record?

A. April 21, 1939, yes, sir.

Q. Now, the last hearing that was held was held on the 19th of May, 1939,—the last one you helped conduct.

A. That is right.

Q. That record was transcribed on June 9, 1939, isn't that true?

A. Yes, sir; that is what it says.

Q. Now, you have three records there in your possession—that is transcripts of evidence. One was transcribed on April 21, 1939, and when did you say the first one was transcribed,—the hearing of August, 1938?

A. April 22, 1939.

Q. Now, do you know of your own knowledge, whether or not those two transcripts were in the files with the other papers when you presented them to the Railroad Commission for their deliberations in the May hearing of 1939?

A. My recollection both were within the files.

Mr. Rauhut:

That is, the two prior hearings—the transcripts of the two prior hearings?

Mr. Cale:

Yes.

Q. I believe you have testified that you had your recommendation or your memorandum to the Commission of the last hearing at the time they acted in the file?

A. The memorandum—not a recommendation.

Q. The examiner's memorandum?

A. Yes, sir.

Q. What was your purpose of being in that conference? Did you advise or make recommendations or even discuss these matters with the Commission?

A. Yes, sir; not in the form of advice; only to answer questions they might ask pertaining to any individual case.

Q. Relative to the testimony and to the physical facts pertaining to the tract; is that true?

A. Yes, sir; that is true.

Q. You testified a while ago that you had not included all the testimony in your memorandum. I will ask you this question: In preparing your memoranda to the commission and particularly the memorandum with reference to the last hearing, did you keep anything out of your memorandum that you considered relevant or material?

A. That would probably be a matter of just my opinion.

Q. That is what I am asking you for.

A. Not intentionally.

Q. Since that time have you found out that you did leave out anything that was relevant or material in the Examiner's memoranda.

Mr. Rauhut:

That is asking him now what is relevant and what is not. That would be a conclusion I think.

The Court:

The objection is sustained.

Q. Now, Major Copeland, you did have an oral discussion with the Railroad Commission with reference to these permits?

A. Yes, sir.

Q. You did discuss them one way or the other with them—about how many permits should be granted, of what had been testified to at the hearing?

A. I did discuss with them actions at the hearing; but not in the form of a recommendation as to any permit whether it should be granted or denied.

Q. When was the last order relevant to the granting of permits 1, 2, 3, and 4, on the 2.33-acre tract entered, Major Copeland?

A. You are not talking about the re-hearing?

Q. Yes; I am talking about the re-hearing.

A. The last thing I have a recollection of is an order entered by the Railroad Commission on July 10, 1939, which is an order denying a motion for re-hearing filed by the Sun Oil Company and the Magnolia Petroleum Company.

Q. Had all the records of the three hearings been transcribed as to that date—before that date; do your records reflect that they had?

A. Yes, sir; they show all the transcripts were prepared prior to July 10.

Mr. Cale:

That is all.

Re-Direct Examination.

Questions by Mr. Rauhut:

Q. That order of July 10, 1939, was overruling a motion for re-hearing filed by the Sun and Magnolia?

A. Yes, sir.

Q. At the time the permit was granted for the four wells on June 2, 1939, the transcript of the last hearing had not been made?

A. That is correct.

Q. And you did not undertake to tell them from memory each and every statement and bit of testimony that the witnesses offered at the hearings; you would not undertake to do that?

A. No, sir.

Mr. Rauhut:

That is all.

Mr. Cale:

That is all.

(Witness excused.)

Mr. Rauhut:

I want to show Your Honor now that this memorandum is not a sufficient statement of the evidence adduced, and I am going to offer the transcripts themselves for that purpose.

The Court:

Read the memorandum.

(Thereupon counsel read Plaintiff's Exhibit No. 17 to the Court.)

The Court:

Those are matters I have no control over. Suppose the Commission has made a mistake about it. Can I substitute my judgment for theirs?

Mr. Rauhut:

No, sir; but you can certainly hold it is the duty of this administrative body to decide in accordance with the facts, and if they do not have the testimony before them, how can they purport to act?

The Court:

Doesn't it boil itself down to a proposition of whether they have to sit there and hear the matter themselves, or if they can send these men out to hold these hearings?

Mr. Rauhut:

I will concede that they can have an examiner hold a hearing; but they have got to read this testimony and know what it is and find the facts; otherwise, they have denied us due process of law and denied us a full and fair hearing, when they do not know what the evidence is.

The Court:

It is a pretty hard proposition to say whether they knew the facts or not. The only thing I take exception to is that you are going into minute detail into a lot of things that will not help us when we get through. When we get through the question will be boiled down to whether the Commission really gave you a hearing or not.

Mr. Rauhut:

I was merely attempting to show that the memorandum was not a sufficient statement of the evidence adduced, because the memorandum contains incorrect statements; it does not state all the evidence, and it incorrectly states

some of the evidence; it does not state objections to the inclusion of testimony; and it incorrectly states why the Sun Oil Company refused to submit to cross examination at the hearing.

The Court:

In other words, you say you did not get a fair hearing?

Mr. Rauhut:

That is exactly it; and the hearing that was held, the Commission paid no attention to it whatever, and they did not know what took place and could not know.

The Court:

All right.

Mr. Rauhut:

Now, first, for the limited purpose of showing that this Examiner's memorandum does not state these adequately and properly to the Commission and was not sufficient in itself to excuse the reading of these transcripts, I want to offer the transcripts of these three hearings. Secondly, we offer them for the limited purpose of showing what evidence was received there, and with the objections and exceptions that were made, and the insufficiency of the evidence the Commission had before it on another attack on the validity of these permits. They are offered for those limited purposes.

The Court:

You can put them in, but I am not going to let you read them to me now.

(Thereupon the transcripts above referred to were marked for identification as Plaintiff's Exhibits Nos. 18, 19, 20, and same are herewith set out as follows):

246 PLAINTIFF'S EXHIBIT No. 18.

Railroad Commission of Texas Oil and Gas Division.

Case No. 26,868, Rule 37.

In Re: Application of G. E. Burford for Special Permit to Drill Wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33 Acre Tract in the D. Sanchez Survey, Gregg County, Texas.

Hearing Held in Austin, Texas, State Capitol August 15, 1938, at 2:00 P. M.

Before: J. D. Copeland Jr., Examiner.

Record prepared by: Louise Kirk, Oil & Gas Division Railroad Commission, Austin, Texas.

Appearances:

Harry Pollard,
Austin, Texas.
Gordon Griffin,
Austin, Texas.
Dillard Estes,
Fort Worth, Texas.
Representing: G. E. Burford, Applicant.

R. W. Ketelsen,
Tyler, Texas.
Representing: J. G. Beard, Protestant.

J. B. Robertson,
Austin, Texas.
Representing: Magnolia Petroleum Co., Protestants.

J. W. Stayton,
Austin, Texas.
Representing: The Atlantic Refining Co., Protestants.

C. B. Jeffrey,
Austin, Texas.
D. M. Collingwood,
Dallas, Texas.
Representing: Sun Oil Co., Protestants.

Mr. Robertson:

By way of plea in abatement and objection to the consideration of this application I wish to call the attention of the Commission and the Examiner to the fact that an application of Mamie Hammond to drill either one or more wells on this same strip of land was granted by the Railroad Commission sometime ago and that the Sun Oil Company and Magnolia Petroleum Company filed an appeal from that order in the District Court of Travis County, Texas, being Cause 54769 entitled Magnolia Petroleum Company et al vs. Railroad Commission, Mamie S. Hammond et al, and that a trial of that case was had and on the 31st of January, 1935, a judgment was rendered by that Court cancelling the permit and order of the Railroad Commission and enjoining the defendants Mamie S. Hammond and husband O. O. Hammond and intervener T. S. Schroeder, their agents, servants and legal representatives from drilling or attempting to drill or permit to be drilled or produced or permit to be produced oil, gas and so forth from any well drilled under that permit. In that connection I want to offset in evidence a certified copy of that judgment. I also want to make a part of the record the proceedings in that case. May it be agreed that the proceedings in that case as now on file in the District Court can be considered as part of this record without bringing certified copies?

Mr. Pollard:
Subject to objection as to materiality?

Mr. Robertson:
That is right.

Mr. Pollard:
I don't require that you bring certified copies. I will waive the certification of it but I don't agree to the materiality or admissibility of it on any ground because the judgment speaks for itself and the judgment has been introduced in evidence which merely restrained the drilling and production of oil from that particular well under that particular permit which is set forth by number in the judgment.

Mr. Robertson:
I make the pleadings part of this record. Is that agreed, that the pleadings in that case may be made a part of this record without bringing the pleadings in but merely furnishing you a certified copy thereof later on?

Mr. Copeland:
As far as we are concerned, an uncertified copy would be all right.

Mr. Robertson:
Then I will furnish an uncertified copy.

Mr. Copeland:
I think it will be all right as far as we are concerned.

Mr. Pollard:
It is a useless encumbrance of the record because there were quite a number of pleadings filed by the various protestants or parties to the suit, plaintiffs, interveners, and two defendants and one intervening defendant, none

of which could have any materiality to the present hearing, his present objection going only, as I understand it, in the nature of a plea in abatement to this hearing on the ground that that judgment constitutes an adjudication of the present matter and application.

Mr. Copeland

I think it would be material to this extent that they would show the situation as it was at that time compared to the present time.

Mr. Robertson:

In connection with this we show to the Commission that the judgment of the District Court cancelling this permit was made on the ground that the Mamie Hammond strip which is the same strip we have here now, constituted a subdivision made in derogation of Rule 37 and there was no issue in that case as to the extent of drainage. It was admitted by everybody that the tract was being drained and it was contended by the plaintiffs in that case that their wells were not only draining the tract but would if permitted to operate during the producing life of the field drain all the recoverable oil from under that tract. And in that connection we make the contention that there have been no changed conditions in this case which would justify the reopening of this case because it was admitted in that trial that the tract was being drained and if there is any change in conditions it could only be perhaps a slight hastening of drainage by drilling of additional wells. Therefore we contend that the decision in that case is res adjudicata of the right to drill a well on that strip and binding on the Railroad Commission and that the Railroad Commission has no jurisdiction to hold this hearing.

Mr. Jeffrey:

Sun Oil Company objects to the consideration of this application because there is now pending in the District

Court of Travis County Case 53915 styled Sun Oil Company vs. Railroad Commission of Texas, a lawsuit involving the validity of the permit on this same tract of land and—

Mr. Copeland:
What permit is that?

Mr. Jeffrey:
It did involve the permit prior to the one he talked about. That suit is still pending.

Mr. Robertson:
Magnolia Petroleum Company will adopt that objection.

Mr. Jeffrey:
For the purpose of the record I would like to agree with Mr. Pollard to bring the pleadings in Case 53915—We have a statement from the clerk it is still pending—to show the land involved.

Mr. Copeland:
I think he will agree with you to that extent.

(Discussion outside the record.)

Mr. Pollard:
I will agree with you as to the facts which I detailed off the record.

Mr. Jeffrey:
We had any number of grounds for attacking the permit and there has been no adjudication of any of them.

Mr. Pollard:
I will say that the first permit has been abandoned long since and was abandoned at the time they applied for and obtained Mamie Hammond No. 1.

Mr. Jeffrey:

Will you let me furnish just a plain copy and not a certified copy of the petition?

Mr. Pollard:

Subject to our objection to the materiality of it and admissibility of it on other grounds besides lack of certification.

Mr. Jeffrey:

You will not object because they are not certified?

Mr. Pollard:

No.

Mr. Copeland:

The Commission has decided they will rehear this case as shown by the notation on this file.

Mr. Robertson:

Is this a rehearing on the Mamie Hammond application?

Mr. Copeland:

No. It is a hearing on the Burford application which is on the same tract as the Mamie Hammonds tract.

Mr. Jeffrey:

With the understanding that we can furnish uncertified copies of the plaintiff's petition in Case 53915 I hand you a letter under seal by the District Clerk of Travis County showing that that case is still pending and by virtue of that fact we insist that the jurisdiction over this matter is in the judicial branch of the government and that the Railroad Commission is without jurisdiction.

Mr. Copeland:
The Commission has assumed they have jurisdiction and have set the case for hearing and for the benefit of everybody here we will try it on its merits.

Mr. Jeffrey:
I would like to adopt the objection made by the Magnolia Petroleum Company on behalf of the Sun Oil Company with respect to Cause 54769.

Mr. Robertson:
I want to make an additional objection and that is to this effect that it is necessary that the Railroad Commission pass upon the question as to change conditions before it has any jurisdiction to entertain this application and it appears from the notation made on the file by the Railroad Commission that that matter has been passed on and they have decided to entertain this application prior to any hearing and none of the protestants were given an opportunity to appear before the Railroad Commission to give any evidence as to any change in conditions and on behalf of the Magnolia Petroleum Company I want to protest that as arbitrary and such action of the Railroad Commission as is invalid and beyond their jurisdiction. They have no jurisdiction to make any order or come to any decision on this application until after hearing is held at which protestants have an opportunity to present their evidence and objections.

Mr. Jeffrey:
We adopt that objection on behalf of the Sun Oil Company.

Mr. Copeland:
We will overrule the objection and proceed with the hearing.

Mr. Pollard:

At the outset may I say, Mr. Copeland, that the applications for the present permits seeking the authority to drill and operate wells numbers one to four inclusive by Mr. G. E. Burgord on the Fuller tract in question are sought primarily on the ground of prevention of underground physical waste of oil and gas and secondarily on the ground of preventing confiscation of the property of G. E. Burford, the owner of the lease on this tract of land and of the fee owner thereof. I would like to offer the testimony of Mr. Gordon Griffin whom I will ask to be sworn.

Mr. Robertson:

Before you go any further I want to make an additional objection to this permit on this same strip on the ground that a permit was denied on this tract by the Railroad Commission in 1938 in Case 25,562 and that this was res adjudicata of this application and I desire to make everything in that file and all the evidence in that case a part of the record in connection with our objection here.

Mr. Pollard:

In reply, may I state that the Supreme Court of our State disagrees with counsel because they have expressly held in the case of Magnolia Petroleum Company vs. New Process Production Company and the Railroad Commission that the denial of a permit application by the Commission does not and can not constitute an adjudication, a final adjudication, of the rights to a permit so applied for but that the Commission itself may again have a hearing and upon hearing after notice grant an application previously denied, recognizing that the Commission, being human, like all other humans, is subject to mistake and an appeal need not be taken to the Courts from the denial order. I offer and will furnish to the Examiner

a copy of that judgment or opinion should the Examiner desire it.

Mr. Copeland:
I have a copy of it.

Mr. Pollard:
We will offer the original assignment of the lease and ask to substitute a photostatic copy. We offer the assignment of oil and gas lease from T. S. Schroeder to G. E. Burford.

Mr. Robertson:
Is that the same lease Mamie Hammond claimed under?

Mr. Pollard:
It is a new instrument but covers the same tract of land.

Mr. Robertson:
Is this an assignment of the lease she cla ied under or a new lease? Is it a different lease from the one she claimed under?

Mr. Pollard:
It is the same basic title. Mamie Hammond obtained a lease and then leased it to Schroeder and Schroeder has assigned it to Burford.

Mr. Robertson:
Then it is the same lease Mamie Hammond claimed under.

Mr. Pollard:
We offer that instrument in evidence.

Mr. Copeland:
It will be the applicant's Exhibit No. 1.

Mr. Pollard:
It has not yet been recorded. It describes 2.81 acres out of the original W. L. Fuller 100 acre tract more or less which was subsequently leased by a metes and bounds conveyance of the east 50 acres which by assignment is now owned by the Magnolia and the west 50 acres by metes and bounds which by assignment is now owned by the Sun Oil Company, it being the tract extending north and south and lying between the Magnolia and Sun Company leases. It is described in here by metes and bounds as being 2.81 acres of land. I will use Mr. Griffin as a witness.

Mr. Stayton:
Let the record show the Atlantic adopts the other protests which have been made.

Mr. Pollard:
Shall I prove up Mr. Griffin's qualifications or will you admit them?

Mr. Stayton:
We will admit them generally.

Mr. Robertson:
For the purpose of this hearing only the Magnolia waives testimony as to his qualifications generally.

Mr. Jeffrey:
We will waive them generally.

Mr. Stayton:
We don't admit he knows anything about this particular lease but admit he is generally qualified.

Mr. Jeffrey:

You need not qualify him on my account.

257 MR. GORDON GRIFFIN, having first been duly sworn as a witness, under oath testified as follows upon examination by Mr. Pollard:

Q. Mr. Griffin, I hand you a plat which is attached to the application of Mr. Burford for the permits which he seeks in this hearing and will ask you whether or not you have made a study or investigation of the area depicted thereon, being the G. E. Burford 2.81 acre tract and the Magnolia Fuller 50 acre tract to the east and the Sun Oil Company 50 acre tract to the west?

A. I have.

Q. Have you also studied the drainage conditions which exist there with respect to the drainage of oil from the G. E. Burford tract by the Magnolia and Sun offsetting wells respectively?

A. I have.

Q. State whether or not in your opinion the wells offsetting the G. E. Burford W. L. Fuller tract to the east, namely, wells Nos. 1, 5 and 6, are draining the G. E. Burford tract?

A. They are.

Q. They are draining oil from beneath it?

A. Yes.

Q. With respect to the Sun Oil Company wells Nos. 2, 7, and 5 state whether or not in your opinion those wells are draining oil from beneath the G. E. Burford tract?

Mr. Robertson:

Just a minute. I think that before Mr. Griffin has qualified himself to testify as to an opinion as to drainage on that point he should make some showing that he has some familiarity with the conditions in the area and the

nature of the underground structure there. We make that objection to his giving any opinion as to drainage in that area.

Mr. Copeland:
Wasn't that admitted in the trial of this case in the Court house?

Mr. Robertson:
We object to his giving any testimony as to an opinion unless he shows—

Mr. Copeland:
Wasn't that an agreed fact in the hearing at the Court house?

Mr. Robertson:
I am willing to agree that the wells on both sides are draining this tract.

Mr. Copeland:
Is that what you are going to show?

Mr. Pollard:
Yes. I will bring out by him and he has testified that the Magnolia wells will drain some oil from beneath this tract and I assume he will answer that the names wells on the Sun Oil Company tract will drain some oil from this tract.

Mr. Griffin:
My answer is this—

Mr. Robertson:
I object to him giving any testimony as to drainage unless he shows he knows something about the structure in this neighborhood. I am perfectly willing to make the agreement.

Mr. Copeland:

I think if you agreed to that in the Court house—

Mr. Robertson:

I have offered to make the agreement.

Mr. Pollard:

If he has agreed to it in the Court house, it can hurt nothing if he answers the question. What was your answer?

A. It was yes.

Q. Have you made a study of the conditions in this area as reflected by the well logs shown on that plat?

A. Yes, sir.

Q. Being well logs filed with the Commission and constituting official files and records of the Railroad Commission?

A. Yes, sir.

Q. Have you made a study of the sand conditions shown to exist in this area as reflected by those well logs?

A. Yes.

Q. Will or will not the well logs as required by the Railroad Commission to be filed with it reflect the nature of the sand conditions in the area surrounding the wells the logs of which are filed with the Railroad Commission?

A. No, sir.

Q. In what respect do you mean that?

A. They will not show the san dconditions but it will show how much sand they penetrated and what they penetrated other than sand and how deep the wells are drilled and how completed and what the initial production was and the formations penetrated by the driller.

Q. What further study have you made of the conditions in this area?

A. I have determined the number of pumping wells and the wells producing water and the nearness of this

area to the east side of the field and its position on the structure and practically everything that is necessary or possible to learn about it.

Q. With the best knowledge that petroleum engineers and geologists have?

A. Yes.

Q. Have you or not prepared on a duplicate plat to the one attached to the present application any data relative to the drainage influence of the wells as depicted on the applicant's plat?

A. I have.

Q. Do you have that plat with you?

A. Yes.

Q. What does the plat which you have presented me disclose with reference to the drainage conditions in the respective wells shown here?

A. It reflects an area surrounding each well that is 330 feet from that well. In other words this area which I have colored in pink or red is that portion of the W. L. Fuller lease which is at a greater distance from any well than 330 feet.

Q. As I understand it, the circles which are drawn around each well shown on this plat have a radius of 330 feet?

A. That is true.

Q. With each well shown being in the center, the exact center, of the circle?

A. It reflects an area surrounding each well that is 330 feet from that well. In other words this area which I have colored in pink or red is that portion of the W. L. Fuller lease which is at a greater distance from any well than 330 feet.

Q. As I understand it, the circles which are drawn around each well shown on this plat have a radius of 330 feet?

A. That is true.

Q. With each well shown being in the center, the exact center, of the circle?

A. Yes, sir.

Q. What is the significance of the radius of 330 feet?

A. That is the Commission's spacing rule for the East Texas field, that wells must be spaced 330 feet from the line or 660 feet from other drilling or producing oil wells.

Mr. Stayton:

We will object to any plat showing any 330 foot radius because it is not material. It should be 466 feet if he wants to introduce such a plat.

Mr. Jeffrey:

We object further to this witness testifying as to what the Railroad Commission's rules mean as we have not understood that he attempted to qualify as an expert on that line, embodying as it does any number of legal matters, and we have no objection to him stating what is upon the map subject to our objections as to its materiality but we strenuously object to any conclusions by this witness as to what it means.

Mr. Pollard:

He has only stated that the reason he took the 330 foot basis to use it as a radius was because that is the minimum distance at which wells can be drilled by the Commission's order without special permits. That is a matter of common knowledge and isn't an attempt to construe the rule but is merely showing why he took the radius of 330 feet.

Mr. Robertson:

I want to add an additional objection that Rule 37 while it calls for wells spaced a minimum of 660 feet apart without special exceptions which involves the drainage diagonally of wells so spaced, the midpoint of which is ap-

proximately 466 feet, that Rule 37 does not provide or imply that the drilling of wells slightly further apart than that will cause waste but only provides and implies that the drilling of wells closer than that will cause waste and there is no finding of the Commission that wells will drain a minimum of 466 feet but only a finding that wells spaced closer than that will cause waste.

Mr. Jeffrey:
We adopt that objection.

Mr. Pollard:
That is just an interpretation of the rule with which we disagree.

Mr. Stayton:
We make one further objection and that is that it has been covered before but we want to object to the testimony because the former suit is res adjudicata because at that time there were fewer wells drilled on the surrounding tracts than at the present time and Mrs. Hammond being in privity with the applicant, she being in his chain of title, he is bound by everything litigated in that case as well as what could be litigated there and we object to any testimony on the waste feature for that reason.

Mr. Robertson:
There couldn't be any show of changed conditions.

Mr. Stayton:
Any change in conditions would be against their position.

Mr. Copeland:
We will go ahead.

Mr. Robertson:
Can we have it understood that these objections apply to all the testimony all the way through without being repeated?

Mr. Copeland:
Yes.

Mr. Jeffrey:
That was our understanding at the outset.

Q. As I understand it, your testimony is that you took the 330 foot basis for the radius of the circles drawn around each of these wells because of the fact that that is the minimum distance at which wells can be drilled without invoking the special exception contained in Rule 37?
A. That is true.

Mr. Robertson:
Mr. Copeland, I understand that these objections have been overruled; is that correct?

Mr. Copeland:
Yes.

Q. You used the 330 foot radius to show what with respect to drainage?
A. I used that to show the present development program within the area, showing that under the Commission's spacing order of 330 feet it will show that portion of each of the leases that will be drained of the per cent of recovery that the Commission desires under the 10 acre spacing program—

Mr. Jeffrey:
May we have our objection to that question and answer too, Mr. Copeland?

Mr. Copeland:
Yes.

Mr. Stayton:
On the ground of what the Commission desires. That is strictly a conclusion.

Q. Does each circle surrounding each well shown on this plat indicate the drainage area, the effective drainage area, to more or less an extent, of the individual well which is located at the axis?

A. Yes, sir, it does.

Q. I notice that you have, as you mentioned, areas extending through the locations in the center of the G. E. Burford tract which are colored in pink or red. That area which is so colored is that the area which is or is not being efficiently drained under the 300 foot drainage influence of the wells on the offsetting tracts?

A. It is.

Q. What?

A. It is an area that is not being adequately drained under the 330 and 660 foot spacing.

Q. With reference to the proposed locations of the G. E. Burford No. 1, do you have a circle extending around that well with that well used as the axis?

A. I have a red circle extending around that well with the center of the radius at the No. 1 location.

Q. Is that radius the same distance or greater or less than the radius of the other circles?

A. It is an equal distance, an equal radius.

Q. Does the area which is included within that circle or not indicate the area which will be drained through the operation of the well No. 1 in the production of oil and gas?

A. It does.

Q. Does that plat likewise show the same data with respect to the locations for the proposed Burford well No. 2?

A. Yes, sir.

Q. And likewise for the locations for wells Nos. 3 and 4?

A. Yes, sir.

Q. And if the four wells applied for are drilled and are operated in the production of oil and gas, would or would not the area which is colored there and which you have indicated to be the areas which would not be effectively drained by the surrounding wells be drained of the oil by the drilling and operation of those four wells?

A. It would.

Q. Mr. Griffin, as shown by that plat, what is the distance between the Sun Oil Company well No. 1 and the nearest offsetting well on the Magnolia tract?

A. 1050 feet.

Q. That Magnolia well is the No. 1 well?

A. Yes.

Q. What is the distance between the Sun No. 2 and the Magnolia No. 1?

A. 740 feet.

Q. What is the distance between the Sun No. 2 and the Magnolia well No. 6?

A. 850 feet.

Q. What is the distance between what is shown as the Beard well No. 1 and the Magnolia well No. 1?

A. 1170 feet.

Q. What is the distance from what is shown to be the Beard well No. 3 to the Magnolia well No. 1?

A. 800 feet.

Q. What is the distance between what is shown to be Beard No. 9 and Magnolia well No. 1?

A. 730 feet.

Q. What is the distance from the Sun well No. 2 to the Beard well No. 3?

A. 1020 feet.

Q. What is the distance between the Sun well No. 2 and the Beard well No. 9?

A. 1340 feet.

Q. What distance is there between the Magnolia well No. 1 and the Magnolia well No. 6?

A. Approximately 715 feet.

Q. What is the distance between the Sun well No. 7 and the Magnolia well No. 1?

A. 1000 feet.

Q. What is the distance between the Sun well No. 5 and the Magnolia well No. 6?

A. 975 feet.

Q. What is the distance between the Sun well No. 7 and the Magnolia well No. 5?

A. Approximately 1000 feet.

Q. What is the distance between the Sun well No. 5 and the Standard of Kansas No. 4?

A. 750 feet.

Q. And the distance between the Magnolia-Reserve well No. 4 and the Magnolia Fuller No. 5?

A. 950 feet.

Q. Did I ask the distance between the Sun well No. 5 and the Standard of Kansas No. 2?

A. It is 1050 feet.

Q. What is the distance between Magnolia well No. 5 and the Standard of Kansas No. 4?

A. 710 feet.

Q. I don't believe I asked the distance between Sun well No. 5 and its well No. 7?

A. 730 feet.

Q. What is the distance between the Sun well No. 6 and the Magnolia well No. 6?

A. 1100 feet.

Q. And the distance between Sun well No. 6 and the Magnolia well No. 5?

A. 1120 feet.

Q. Is there any well now located and producing in the area which is bounded by the Sun's wells Nos. 6 and 7 and Magnolia wells Nos. 6 and 5 and between the Sun and

Magnolia wells No. 5 on each of those respective tracts and between the Sun well No 4 and Magnolia No. 6? being the area located in between those wells.

A. No, sir.

Q. Is there any well now located and producing in the area bounded by the Sun Oil Company No. 2 and the Magnolia No. 1 and the Magnolia No. 6 and the Sun No. 7?

A. No, sir.

Q. Is there any well now producing within the area bounded by the Beard wells Nos. 1, 3, and 9 and the Magnolia No. 1 and the Sun Company No. 2 and the Sun Company No. 1 wells?

A. No, sir.

Q. Is there any well now producing in the area which is bounded by the Sun well No. 5 and the Magnolia well No. 5 and the Standard of Kansas No. 2 and No. 4 wells and Magnolia-Reserve well No. 4?

A. No, sir.

Q. In your opinion is it or not necessary for a well to be located and to produce oil and gas at the location applied for by each of the applications for wells 1, 2, 3, and 4 on the Burford tract?

A. Yes, sir.

Q. If no well is drilled within the four respective areas which we have been talking about as shown on this plat, will the wells which surround those four respective areas produce all the recoverable oil and gas from beneath those four respective areas?

A. They will not.

Mr. Stayton:

We object to the testimony on the predicate laid so far as it is a collateral attack on the rule.

Mr. Jeffrey:

We join in that objection.

Mr. Robertson:
Magnolia also joins in the objection.

Mr. Copeland:
I overrule the objection.

Mr. Stayton:
Note our exception.

Q. If the four permits which are applied for are granted and those four respective wells are drilled at the locations at which they are applied for, will that or not cause or tend to cause uniform spacing in that area?

A. It will and the map clearly reflects that.

Q. With respect to the drainage areas which appear to overlap as between the circles which are drawn around the four locations applied for here and the offsetting wells, will there or not be an increased recovery of oil from the overlapping areas there by virtue of drilling and operation of these four wells?

A. There will be.

Mr. Stayton:
We have the same objection to that testimony too.

Mr. Jeffrey:
Sun joins in the objection.

Mr. Copeland:
Objection overruled.

Q. Will that be small or large, that increased production and recovery of oil?

A. I think it will be material.

Mr. Robertson:
May it be understood that we have the same objection to all this character of testimony.

Mr. Copeland:
Yes.

Mr. Robertson:
And it is understood that objection is made and overruled?

Mr. Copeland:
Yes.

Mr. Stayton:
I want to ask one question as the basis for an objection. Mr. Griffin, you believe the greater the density in the East Texas field the greater the recovery?
A. I think most of the engineers agree as to that.

Mr. Stayton:
I asked if you did?
A. I join in that belief.

Mr. Pollard:
I think the Commission has made that same finding by its own orders. It isn't inconsistent with the administrative and fact finding views of this body.

Mr. Stayton:
You think that wells drilled less than 660 feet apart will increase the recovery in East Texas?
A. I do.

Mr. Robertson:
That is the basis of all your opinions?
A. No, sir.

Mr. Robertson:

The opinions you have just expressed as to increased recovery is based on that?

A. As to the basis of my opinion, it is based on that, uniform spacing and closer drilling.

Mr. Robertson:

Then we want that blanket objection to everything in this case based on what has been stated so far.

Mr. Copeland:

All right.

Q. Will there be a less or greater recovery of oil from beneath the area which you have shaded in pink or red on this plat if these four wells are drilled at the location applied for?

A. I think that there will be a substantially greater increased recovery by the drilling of those four wells.

Q. Will the drilling of each of those four wells cause the production of oil or gas from beneath such pink areas which would not otherwise be produced and recovered by any of the other surrounding wells in this area?

A. It would.

Q. Would that be small or large?

A. I think it would be large.

Q. You previously testified as I understood you that the wells nearest to the Burford tract on the Magnolia tract are draining some oil from beneath the Burford tract and that the named wells on the Sun Oil Company tract nearest the Burford tract were draining some oil from beneath this tract. Are those wells and would those wells during their producing life time produce or will produce all the recoverable oil in the sands beneath that area under the Burford tract?

Mr. Jeffrey:
We object to that question.

Q. Would the drilling of the four wells applied for produce oil which those offset wells could not and would not obtain?

Mr. Jeffrey:
Which question do you want him to answer?

Mr. Pollard:
It is just one question.

Mr. Jeffrey:
We object to that question because there is no proper predicate laid for asking the question and the answer to the question would be an attack on the rule itself with the evidence that has been adduced and we therefore submit that no proper predicate has been laid for the question and objects to the question nd to this witness's attempt to answer it.

Mr. Copeland:
I think he has laid his predicate by stating the closer he drills wells the more recovery he will get.

Mr. Jeffrey:
Note our exception.

Q. Mr. Griffin, in your opinion would the drilling of any or all the wells applied for cause or tend to cause any underground physical waste of oil and gas?
A. No, sir, I think it will tend to prevent underground waste of oil.

Mr. Stayton:

That is a different question but we have the same objection.

Mr. Jeffrey:

We have the same objection.

Q. In your opinion would there be a greater or lesser ultimate recovery from the entire field if the four wells applied for are drilled or would there be less recovery if they are drilled?

A. There would be a greater recovery.

Q. Would that likewise apply to the recovery of oil in this particular area?

A. Yes, sir.

Q. Where is this area situated with respect to the northeast edge or boundary of the East Texas field?

A. The east side of the field in this area is approximately the east side of the Magnolia Petroleum Company's Fuller lease.

Q. Are there any producing wells situated in a more easterly direction to the Magnolia's Fuller tract?

A. No, sir, there are none east of it.

Q. In your opinion and from the investigation you have made is there any woodbine water underlying this lease?

A. No, sir, there is not.

Q. Or underlying either of the adjacent leases, the Sun tract or the Magnolia tract?

A. No, sir.

Q. Or the Beard tract to the south or the Standard or Reserve and Magnolia leases?

A. No, sir.

Q. Where, if you know, is the closest woodbine water to this tract to the west?

A. It is several miles.

Q. In your opinion is it probable or possible that the drilling and production of oil from the four wells applied

for would cause any channeling or coning of the water in the sands or infiltration of water through the sands in this immediate area to drive off any oil?

A. No, sir.

Q. We offer the plat with the matters shown thereon, the plat which is a duplicate of the plat attached to the application for these four wells as our Exhibit No. 2.

Mr. Jeffrey:

We have our previous objections to the offer and renew the same objections to the offer of the plat.

Cross Examination of Mr. Griffin by Mr. Robertson:

Q. In your opinion are the structural conditions, the underground structural conditions substantially uniform under the Sun and Magnolia leases and under the strip between them that is involved in this case?

A. Definitely they are not.

Q. What are the differences?

A. The Sun has a pumping well on their property, their No. 5.

Q. The numbers you used on this plat are different from the ones on our plat. You say well No. 5 of the Magnolia is a pumping well?

A. No. 5 of the Sun.

Q. What else?

A. No. 9 up on the J. G. Beard.

Q. Is that well producing its minimum per day of 20 barrels?

A. I assume that it is.

Q. I am not asking for an assumption. You don't know?

A. No.

Q. What other differences are there?

A. No. 9 of J. G. Beard is a pumping well.

Q. Do you know whether that well is producing its minimum of 20 barrels a day?

A. I couldn't answer that.

Q. What other differences are there, in the structural conditions under this land?

A. That is all I know of.

Q. So far as you know—is it or not your opinion that except for the fact that those two wells are pumping that the oil producing structure beneath the Sun Company lease and the Magnolia lease and the applicant's strip is substantially the same with regard to porosity, permeability and other conditions which affect the migration of oil in this East Texas oil field?

A. No, sir. On initial completion and potentials of the various wells have quite a bit of difference. That shows there is a difference in the sand conditions.

Q. Isn't that information very unreliable in the well logs on account of the fact they use different chokes and the initial production is made under different conditions and perhaps not very carefully recorded.

A. I don't know how careful it is but it is a sworn record by the operator who drilled the well.

Q. Does it show how long they operate and what size choke they used?

A. It shows how long the test was. The first hour tes after completion. The ones which I have looked at are the first hour test.

Q. Are there any differences in the initial production?

A. We will take the Magnolia. The No. 6 well made 80 barrels the first hour.

Mr. Copeland:

What kind of choke?

A. It doesn't give the choke.

Q. Then you can't tell anything about it unless you know the size of the choke?

A. Some of them give the choke. Practically all of them were through open tubing.

Q. You weren't there?

A. I am reading the logs.

Q. Does it say open tubing?

A. Yes. No. 4 of the Magnolia the first 24 hours—it made 100 barrels first hour through open 2 inch choke or 2½ inch tubing.

Q. That wouldn't be called a choke, would it?

A. It is a choke. It is probably just the size of the flow line they had.

Q. It only produced 100 barrels the first hour?

A. Yes.

Q. When was that well completed?

A. It was completed December 7, 1936.

Q. What is another one?

A. The No. 3 of the Magnolia pumped 50 barrels the first day. That is considerable difference. One of them flowed 100 barrels an hour and another one pumped 50 barrels a day.

Mr. Copeland:

When was that completed?

A. It was completed in April 1936, about 7 months prior.

Q. It is very close to the east edge of the field, isn't it?

A. Right here.

Mr. Copeland:

It is the most easterly well, isn't it?

A. No, sir. The No. 4 which flowed 100 barrels a hour is shown east, further east than that one. That is the inward well from the original one. The outward well is on the pump.

Q. The Pender & Jones which offset the No. 3 is a dry hole, isn't it?

A. Yes.

Q. Then that is right on the edge of the field?

A. Yes.

Q. In your opinion doesn't that explain the reason why it had to be pumped from the start and produced so little oil?

A. There are some dry holes all along that edge over there.

Q. What other initial productions do you have?

A. That shows a pretty big variation. I doubt if I could ever find a larger one.

Q. I want them on all these two leases.

A. Here is one on the No. 2 of Magnolia. 60 barrels the first hour through tubing.

Q. Does that show what sized tubing?

A. It doesn't show but I am sure that is what it is.

Q. If it doesn't show, you can't tell anything about that.

A. I couldn't swear to it but it is my opinion that it was.

Q. What else do you have?

A. I have some on the Sun lease. Sun No. 7 made 28 barrels in 30 minutes through open tubing.

Q. What size? No size shown?

A. It shows open tubing.

Q. And no size shown? No size of tubing shown?

A. Sure it is shown. 2 inch.

Q. Does it show that is the tubing that the initial production was through?

A. Yes.

Q. That is 28 barrels in 30 minutes?

A. Yes. 56 barrels an hour.

Q. When was that completed?

A. In October, 1937

Q. That is Sun No. 7?

A. Yes. Here is Sun No. 4. It made 45 barrels an hour through 2 inch tubing.

Q. When was it completed?

A. April.

Q. 45 barrels an hour. That is less than the No. 7 produced per hour, isn't it?

A. Yes.

Q. No. 7 was 56 barrels an hour. The No. 4 is further west and therefore should be a better well, shouldn't it?

A. Yes.

Q. What is the next one?

A. Sun's well No. 3 made 7 barrels an hour through tubing.

Q. The size isn't shown?

A. No. It wouldn't flow so they put tapered tubing in to make it flow. It is a sick well. That is customary to use tapered tubing when you have a sick well.

Q. It makes the opening smaller?

A. Yes.

Mr. Copeland:

It is the same as a 1 inch choke.

A. Here is the No. 2 which is a short distance from it. It is eastward and should be a worse well. It made 37 barrels an hour through tapered tubing, the same sized tapered tubing. It made 37 barrels and the No. 3 made 7 barrels.

Mr. Jeffrey:

You don't have the size of the taper?

A. Yes. It is from 2 inches to 1½ inches to 1 inch.

Mr. Jeffrey:

The same on the No. 3?

A. Yes. 2 to 1½ to 1.

(Robertson):

Q. When was that completed?

A. In 1932. Both of them.

Q. The No. 2 and the No. 3 were both completed in 1932?

A. Yes. Now 3 was in November 1932 and No. 2 was in May. And the Sun No. 5 made 26 barrels an hour.

Q. Through what?

A. It doesn't say. I would say it was 2 inch tubing.

Q. I would rather you didn't give your opinion. If you don't know what it was just say you don't know. If it doesn't show, just say it doesn't.

A. I think I know enough about it to say that. In my opinion as an engineer it is open tubing.

Q. I want him to just answer what I ask him and not interpolate statements I didn't ask for.

Mr. Pollard:

We submit he has the right to submit his answers without answering yes or no, and he is qualified to state his opinion by his experience as an engineer.

A. If all of them are through open tubing—I don't think they would choke one of them.

Q. I just asked what the report showed.

A. The report doesn't show that it is choked. It shows it has 2 inch tubing.

Q. Does it say 2 inch tubing on the report?

A. Yes.

Q. But it doesn't show whether its initial production is through the tubing or not.

A. That usually—

Q. It doesn't show whether it is through a choke or not?

A. No.

Q. Please tell me again what was the initial production of that well?

A. 26 barrels per hour.

Q. Is there any other reason except these variations which lead you to say that there is a variation in the

character of the producing structure underground in this section? Anything else or any other reasons you have for making that statement.

A. That is sufficient reason. In my opinion, you know, it is a lot of difference.

Q. You don't know what the characteristics are beneath this strip?

A. What do you mean?

Q. Do you have any opinion as to the nature of the producing structure under the strip involved in this case?

A. No, sir.

Q. Is it—what is your opinion as to its similarity to the structure on both sides?

A. It would be higher on one side and lower on the other.

Q. What side?

A. Thicker on the west and thinner on the east. That is, generally speaking.

Q. Uniformly? A uniform variation?

A. No.

Q. If there are variations, you don't know where they are and have no opinion as to where they are?

A. Yes, I do.

Q. Where are they in your opinion?

A. These well logs show that there is the—that there isn't the same amount of sand underneath any of them.

Q. I am taking about the strip.

A. We haven't drilled any on the strip and I couldn't tell you that.

Q. Have you any opinion as to the porosity of the oil sand underneath the strip as compared with the oil sand immediately to the east and west?

A. No.

Q. It may be better or worse under the strip?

A. Yes.

Q. And the same as to the permeability?

A. I would say that the permeability is a little—is a lot different.

Q. Different under the strip from that immediately to the east and west?

A. I don't know about the west because we haven't drilled it. I couldn't answer that.

Q. The strip might be very much more permeable than the structure immediately east and west?

A. Yes.

Q. And it might be very much less permeable?

A. That is right.

Q. You have no opinion either way?

A. No, sir, that is why we have to drill these wells.

Q. If it comes to a question as to whether a well drilled at the location of No. 2 on the strip will produce more oil than a well 100 feet to the east or 100 feet to the west you wouldn't have any opinion at all, would you?

A. Produce more oil?

Q. More total oil.

A. I would not. I couldn't tell you which well would dry up first.

Q. Take the location of the well No. 2 and take a well offsetting it to the west equidistant from the edge of the strip and another well equidistant to the east. You have no opinion as to which of those three wells would produce the most oil?

A. No, I don't.

Q. You would give the same answer with regard to locations Nos. 1 and two offset wells?

A. I would give the same answer to any undrilled well in this area.

Q. Then you couldn't give an opinion that a well drilled at any one of the locations 1, 2, 3, or 4 would cause more ultimate production of oil or less than the offset well drilled to each or any of those locations to the east and west.

A. Under the present conditions a well drilled at either 1, 2, 3, or 4 will tend to increase the ultimate recovery from the field and from this area.

Q. A well 50 feet west of location No. 1 might increase it more, mightn't it?

A. It would increase it more.

Q. And a well 50 feet to the east of the line of the strip at that point might increase it more.

A. It would increase it still more if all three wells were drilled.

Q. I mean if the No. 1 isn't drilled.

A. I can't answer that.

Q. You wouldn't know?

A. No.

Q. You wouldn't know which location would be the best to drill a well to get more oil?

A. No. I would say if you are going to drill that way, drill all three of them.

Q. I'm not asking that. You would give the same answer with reference to each of the locations?

A. Yes.

Q. The testimony you have given as to the distances of the wells from each other is based entirely on the plat?

A. On the sworn map.

Q. You don't know anything about the distances yourself?

A. The only thing is from the application.

Q. You just took the map or plat as being correct?

A. And the Magnolia's own records and the Sun's own records.

Q. Did you do any scaling?

A. They are marked on here.

Q. You didn't testify from that.

A. I have it here to check that with.

Q. Did you check it?

A. I can.

Q. You don't know without checking whether it is the same or different, do you?

A. I have checked several and they have been approximately the same.

Q. In arriving at the distances you mainly did it by scale?

A. I did. Every answer I gave was by scale.

Q. Scaling on this kind of a map can be off from 15 to 40 feet or perhaps more?

A. I think that 20 feet would get it.

Q. The size of the dot for indicating a well alone, if the well doesn't come exactly in the center of it—the dot could throw you off 30 to 40 feet?

A. I measured from the center of the dots.

Q. If the dot were not correctly placed that could throw you off 30 or 40 feet?

A. If this licensed engineer didn't prepare his plat correctly then I am wrong. If he did prepare it correctly under his affidavit my measurements are right.

Q. Except that the paper stretches and shrinks, doesn't it?

A. Of course it will shrink a little.

Q. So that the distances you have given in scaling could be off to that extent?

A. I could be off a whole lot and still my answers would be the same because it is such a great distance.

Q. That is all.

Mr. Copeland:

We will recess for a few minutes.

Cross Examination of Mr. Griffin by Mr. Jeffrey:

Q. Mr. Griffin, you were present at the Cecil Cammack application for three wells on this tract, weren't you?

A. I was.

Q. Did you present in that hearing a map like the one which you have offered as the applicant's Exhibit 2?

A. I did.

Q. As I understand your testimony, it was to the effect that even spacing and increasing the number of wells was your idea of increasing ultimate recovery?

A. Yes.

Q. If you were to drill a well in the center of any one of these four red areas such location would not fall on the strip in question; is that right?

A. If you were to drill one in the center, I believe in the previous application it shows that they were lettered A, B, C, D, and E—

Q. That is in the Cammack application?

A. Yes.

Q. On Exhibit No. 2, applicant's Exhibit No. 2, in that case?

A. Yes.

Q. In one red circle here you would drill on the Sun's Fuller lease?

A. To be in the center of the area, yes.

Q. And in the second one from the north you would drill on the Magnolia's Fuller lease?

A. Yes.

Q. And in the third one from the north you would drill on the Sun's Fuller lease?

A. Yes.

Q. And on the most southerly one of the four, you would drill on the Magnolia's Fuller lease?

A. Yes.

Q. Mr. Griffin, as I understand it, these circles have a radius of 330 feet?

A. Yes.

Q. You weren't telling the Commission that a circle with a 330 foot radius represents 10 acres?

A. No.

Q. Mr. Griffin, as a matter of fact if you drill wells at the four corners of a square 660 feet apart you would have 4 wells with a minimum spacing set out by the rule of 660 feet from other wells?

A. Yes.

Q. What would be the diagonal distance between the well in the northeast corner and the well in the southwest corner?

A. 466 feet.

Q. What would be the total distance between the wells?

A. 466 feet.

Mr. Copeland:

That would be the midpoint.

A. Yes.

Q. What is the distance between the two wells?

A. 933 feet.

Q. Half of that would be 466?

A. Yes.

Q. At the previous hearing on the Cammack application didn't you draw circles with a radius of 466 feet on the map?

A. Yes.

Q. That obliterated practically all of the area shown in pink when using the 330 feet radius?

A. Yes, sir. Let me qualify that. It is impossible to space wells 330 feet apart and have a regular distance between the wells so when they get 466 feet they leave oil in there which would not be recoverd.

Q. I understand your idea is that the more wells you drill the more oil you get.

A. That is right.

Q. But I assume if you drill at the four corners of a square 660 feet that would be as close as you can get the wells and leave alone the exception provisions of Rule 37?

A. Yes.

Q. And under your idea you would have a point in between those four wells which would be 466 feet from any well?

A. Yes.

Q. I understand that it is your idea that the closer you drill them the more oil you will get.

A. Let me see the map where I drew those circles.

Q. Mr. Griffin, you have changed your testimony in this hearing from what it was in the previous hearing. I wasn't present at the former hearing.

A. I don't think it has been changed a whole lot. There have been some changes. I don't recall all the testimony given the last time but I know I drew the same map and the same wells were used. There was additional evidence submitted in this hearing not submitted at the last hearing. There is considerable evidence in this hearing which wasn't submitted at the last hearing.

Mr. Pollard:

Only three were applied for the last time.

Mr. Jeffrey:

He is talking about existing wells.

Mr. Robertson:

The two records will show what was submitted.

Q. Mr. Griffin, with reference to the initial production figures which you gave, you have no way of knowing how the well was completed?

A. No.

Q. Whether it was completed with cable tools or rotary tools?

A. I think so.

Q. Did you take that into consideration?

A. I noticed some of them did show it. I know some of them were completed with cable tools.

Q. I ask you then of those completed with cable tools whether or not in your opinion the initial production was higher than it would have been if completed with rotary tools?

A. It should have been, everything being equal. Let me see. They were lower. They should have been higher but they were lower.

Q. In every instance?

A. In the instances which I checked.

Q. All I am trying to get at is how much information you had before you in arriving at your conclusions. Did you consider how each well was completed?

A. I only considered where the log showed it was completed with cable tools because that is all I had to go by.

Q. In each instance where that was shown you took that into consideration?

A. Yes.

Q. It is your testimony that in each instance where they were completed with cable tools the initial production was lighter?

A. Taking it into consideration, it didn't for my testimony—

Q. I am asking if you did take that into consideration.

A. I took it into consideration where it was shown on the log.

Q. Did you take into consideration in the wells completed with rotary the pressure on which the well was drilled?

A. No, I didn't.

Q. Did you consider whether the wells completed with a rotary were washed with water or oil or how they were brought into production?

A. No. I assumed by my answer that the operator would be sufficiently efficient to complete his well without plugging any pores in the sand and creating waste. I

assumed that a company the size of the Magnolia and Sun would complete their wells in the best scientific method known.

Q. But you don't know?

A. No, I don't know. If they didn't, they created waste and I am sure they did it for the prevention of waste.

Q. I don't know whether the Cammack application has been called to the Commission's attention, but it is Case No. 25,562.

Mr. Robertson:

I have introduced the whole file. I introduced it in connection with the objections by way of abatement. Perhaps it should be reoffered in connection with the hearing.

Mr. Jeffrey:

I would like to offer the testimony of the Sun Oil Company adduced in that hearing.

Mr. Pollard:

As I understand, the Sun didn't have any testimony in that hearing.

Mr. Robertson:

I will offer the whole file and record.

Mr. Jeffrey:

Mr. Ray testified. We reoffer that testimony.

Mr. Pollard:

I will object to that because Mr. Burford was not a holder of a lease covering this tract at that time and he does not have the advantage of hearing the testimony of the gentleman referred to as testifying in that hearing and no opportunity to cross examine and we have no knowledge of what it is about.

Mr. Jeffrey:

Mr. Burford has no connection with Mr. Cammack's interest?

Mr. Pollard:

We had no connection and were not present and did not aply for the permit at that time and we have no knowledge of it and Mr. Burford has no knowledge at this time of what Mr. Ray, the Sun's petroleum engineer, testified.

Mr. Copeland:

We will accept whatever our files on previous cases show.

Mr. Pollard:

I assume that the Commission will take cognizance of what is contained in all its files.

Mr. Copeland:

They do.

Re-Direct Examination of Mr. Griffin by Mr. Pollard:

Q. All the matters I am going to ask you about are contained in the Commission's files and in order to assemble it in the hearing I want to ask you to state if the Commission's records which you have disclose the exact completion dates of each of the wells on the Magnolia 50 acre tract and the completion dates of each of the wells on the Sun Oil Company's W. L. Fuller tract?

Mr. Robertson:

Why not put in all the logs or records and save time?

Mr. Pollard:

They take up too much room in the record and all we want is the matter which I am asking about which is the

completion date of each of the respective wells. I would be glad to save time to have it copied from the records. That is the completion date of each of the wells.

Mr. Copeland:
What difference would it make?

Mr. Pollard:
None at all.

Mr. Copeland:
I mean what difference would it make in this case when they were completed? We don't grant back allowable and it is only the question as to the situation on the ground and all you have to do is have them admit the wells are there.

Mr. Pollard:
There are two matters of argument. The first is with respect to the wells that are now drilled and located and are producing on each of these two tracts and the dates with respect to the development which occurred on each of the respective tracts subsequent to the filing of the first injunction suit against the first Hammond permit and subsequent to the judgment which was entered in the second suit which was filed against the second Hammnod permit for the No. 1 well on this particular tract, all of which would show changed conditions as to the drilling existing in this area and in the vicinity of this tract.

Mr. Copeland:
Why not limit it to those drilled and completed since that time?
A. I would rather put them all down.

Mr. Pollard:

As a matter of fact, I understand that there was only one well drilled on the Magnolia tract and a permit for the second well had been granted and there were three wells drilled on the Sun Oil Company tract at the time of the Hammond application. All the remaining wells on each of these respective tracts have been drilled since that time but the judgment and opinion are already introduced here and so the completion dates of the wells would show the wells that have been completed since that time. They will show another matter. It will show that obviously the wells which were then drilled on this tract now have proved to be insufficient to recover the greatest amount of recoverable oil from beneath those tracts so each of these companies has itself recognized that by coming in and drilling wells. We contend that our rights are such as existed as of the time of the subdivision, if any, and could not have been destroyed by their subsequent recognition of that fact by coming in and drilling additional wells. They cannot destroy our rights in the matter.

Mr. Jeffrey:

The rights as of the time that the subdivision was made have been adjudicated at least once and was pending a second time.

Mr. Pollard:

I say that the Magnolia and Sun cannot obtain an adjudication on one premises as being correct and then come in and pull a rabbit out of a hat by denying that which was adjudicated and come in and ask for more wells and I will say if there is such a thing as equity or good conscience they are estopped to come in or unfortunately then this is that kind of case where they cannot on one hand say to us our rights are finally settled and determined in a judgment and themselves flaunt that judgment in

our faces by coming in when they have a judgment, if it does say there is full development and determine there is full development—come in and drill additional wells in order for them to get more oil under the premises there was not and did not exist full development there. It is agreed we can furnish that?

Mr. Copeland:
Yes.

Mr. Robertson:
As far as we are concerned it is.

Mr. Copeland:
Go on with your examination of Mr. Griffin, Mr. Pollard.

Q. You testified, Mr. Griffin, that the cable drilled wells should have had higher production than the rotary drilled wells but they were in fact slower production. What is the significance of that, if any?

A. The answer is the same as the rest of them. It is due to a difference in sand conditions.

Mr. Stayton:
Mark off the offsets on the map which would be caused by the drilling of these four wells.

A. There would be one on each side.

(Pollard):
Q. Direct equidistant offsets?

Mr. Stayton:
Yes, within 330 feet.

A. I think that they could space a well to the south and eliminate one.

Mr. Stayton:

How many would that be?

A. 16 wels.

Q. Mr. Griffin, in your opinion would it be necessary for each of those proposed offset wells which you have pointed out on that plat as being the locations at which direct equidistant offset wells would be located to be drilled?

A. Yes, sir.

Q. Would that in your opinion prevent or cause waste, underground waste of oil and gas?

A. I think it would enhance the recovery of oil from this area.

Mr. Stayton:

Note our objection. We object to the conclusions on that line of questioning. We have a blanket objection to it.

Mr. Copeland:

All right.

Q. It would likewise increase the recovery from the field?

A. Yes, sir.

Mr. Jeffrey:

It would make for more uneven distribution of wells in the area?

A. Yes.

Mr. Stayton:

So in order to get that ultimate recovery under your theory it would be necessary to start another line of wells like that and continue through the area?

A. If they did, they would get a larger amount of recovery, far more than under the present set up.

Mr. Pollard:
We are through

Mr. Jeffrey:
We offer Mr. Collingwood. Have him sworn, please.

298 MR. D. M. COLLINGWOOD, having first been duly sworn as a witness, under oath testified as follows upon examination by Mr. Jeffrey:

Q. State your name, vocation and employment.
A. D. M. Collingwood, geologist and petroleum engineer, Sun Oil Company.

Mr. Copeland:
Shall he qualify him. He has testified here before.

Mr. Pollard:
We will admit it generally as to his qualifications and knowledge for the purposes of this hearing.

Q. Mr. Collingwood, have you had any experience in the East Texas field?
A. Since the first year of the field, yes.
Q. Were you ever located in the field as geologist and petroleum engineer for the Sun Oil Company?
A. Yes.
Q. Have you made a continuous study of that field since that time?
A. I have.
Q. Mr. Collingwood, have you made any bottom hole pressure tests of any well in this immediate area?
A. Yes. We have kept records on the pressure in this area right from the initial steps in the field and continued to do so. We take the pressure every month.

Q. Have you taken the pressure of any well in this immediate area?

A. Yes.

Q. What well is that?

A. Fuller No. 1 of the Sun Oil Company.

Q. How often do you take its pressure?

A. About every month.

Q. Have you had occasion recently to compare the pressure taken in August 1937 with the pressure taken July 1938?

Mr. Pollard:

Just a minute—

Mr. Copeland:

Is that top or bottom pressure?

A. Bottom hole pressure.

Mr. Pollard:

We object to that unless it was taken in each instance by this witness while he was personally present and saw it. Otherwise it would be the purest hearsay with him and apparently he isn't testifying from matters which constitute official records of this Commission.

Q. For the purpose of qualifying him a little more, Mr. Collingwood, in the course of your employment with the Sun Oil Company have you made any bottom hole pressure tests in the East Texas field?

A. I have.

Q. Have you ever made any on the Sun's Fuller lease?

A. I have.

Q. Are you still in charge of taking bottom hole pressures for Sun Oil Company?

A. I don't personally run the bomb in the hole.

Q. Is it done under your supervision?

A. Yes. It is done under my supervision.

Mr. Pollard:

A man might be a thousand miles away and still have it done under his supervision and it would be hearsay and not binding on us and not binding on this Commission and not shown to be correct within the knowledge of this witness unless he was present.

Mr. Jeffrey:

As Mr. Pollard has aptly stated, the only thing wrong with his objection is that our Supreme Court and our Appellate Courts have held that where it is done under your supervision you are entitled to testify to it.

A. It is my response that they are correct as going into the files of our company.

Mr. Copeland:

I think he can testify.

Mr. Pollard:

We object for whatever the objection may be worth.

Q. How did that compare in August 1937 with July 1938, the bottom hole pressure on the No. 1 Fuller of the Sun?

A. In August 1937 the bottom hole pressure of the Fuller No. 1 was 1093 pounds which compares very favorably with the pressure on the same well of July 26, 1938, which was 1092, only one pound lower after 11 months. In the meantime the pressure had fluctuated along with the pressure in the rest of the field and came down and up and down again.

Q. Mr. Collingwood, I will ask the question from your previous study of the field generally and this area in particular, you are of the opinion that the sand in this immediate area is such that oil can migrate freely—

Mr. Pollard:

We object to that as he has not shown he has any knowledge of the sand conditions in this area on which to base your opinion.

Mr. Copeland:

I think he can testify to his opinion based on his statement on the pressure.

Mr. Pollard:

If it is confined solely to that, that would go to its materiality but we object to it on both the ground of its admissibility—that he cannot show from knowing the pressure of one well that he knows of the sand conditions throughout this entire area.

Mr. Copeland:

I don't believe the question had anything to do with sand conditions. He was talking about permeability and the free movement of the oil.

Mr. Pollard:

I don't think that one well would show that.

Mr. Copeland:

Go ahead.

Q. What is your answer, Mr. Collingwood?

A. The bottom hole pressures over the field reflect the reservoir conditions. As Mr. Griffin says, the core records show the information on a specific well. I am testifying to the permeability which represents the reservoir condition between wells over the field and the analysis of the pressure in this area compared with the rest of the field gives the information on the permeability in this area. It is the only way you do get any evidence of

permeability as to actual performance and actual information on pressure relations.

Mr. Pollard:

He is giving the pressure on one well and from that attempting to testify in response to counsel's question with respect to the migration of oil and related matters in this entire area and we say he has not shown any qualifications or basis for it.

Mr. Copeland:

We will let his answer stand. How does this pressure decline correspond with the balance of the field? With the decline of pressure in the balance of the field. Is it greater or less?

A. It is very even with it. The whole field is gradually declining over a large period of time and this area represents the same kind of decline as the average pressure in the field. It has a lower pressure being on the east side and the pressure is on the west side but very evenly going down in the average way compared with the rest of them.

Mr. Copeland:

Did you state awhile ago that this pressure has decline more than that and has risen more than this but that this represents those two dates?

A. The field has done the same thing.

Mr. Copeland:

Then and now?

A. Yes. Then and now. It has gone up and down with the field.

Q. Mr. Collingwood, from your study of the field generally and of this area in particular, I will ask you whether or not in your opinion there are a sufficient number of wells to get the maximum recovery.

Mr. Pollard:

He has not testified to qualifications with respect to knowledge of this particular area on which to base an opinion as to whether the wells as they now are sufficient to get the maximum recovery.

Mr. Stayton:

If that is necessary, that wouldn't allow any of Mr. Griffin's testimony to be in the record.

Mr. Pollard:

He gave the basis for all his testimony.

Mr. Copeland:

I think he can go ahead and give his opinion.

A. I consider the present wells drilled in this area are sufficient to get all the recoverable oil from the area without additional drilling.

Q. That is all.

Cross Examination of Mr. Collingwood by Mr. Pollard:

Q. On what do you base the opinion? And what per cent of recovery is it your opinion that the wells as they are now situated in this area will recover of the oil originally in place beneath those sands?

A. The ultimate recovery will depend on density and other things.

Q. In what way will it depend on the density?

A. The greater the density the less the ultimate recovery.

Q. Why do you say that and on what do you base that?

A. Because it has been demonstrated and proved by the Commission that the field as a whole is very sensitive to the rate of production and withdrawal from the field. You increase the withdrawals from the field and you in-

crease the withdrawals from any area in this field and it will have the same result and you will have less even production.

Q. What do you mean by even production?

A. Which means less ultimate production because of underground waste of reservoir energy.

Q. What do you mean by even production? What in your opinion is the maximum amount of recovery under the density of drilling now shown to exist on the Magnolia Fuller tract and the Sun Fuller tract?

A. I am talking about degrees of ultimate recovery. I don't say what it will be. Nobody knows.

Q. If we are talking about something none of us know, we can't get anywhere with it. We can't know what the result will be, but I will ask you to tell us what in your opinion and what you base it on—what will be the percentage of recovery of the oil in place originally beneath these areas with the present drilling pattern as it is existing on the Magnolia Fuller tract and the Sun Fuller tract?

Mr. Jeffrey.

We object to that question because the witness said he didn't give any per centage and it is an attempt to argue with the witness. He said he couldn't give it.

Mr. Pollard:

I didn't understand it that way.

A. The slower you withdraw oil from this area per acre the more ultimate production you will have.

Q. That isn't my question. Here is my question, Mr. Collingwood. What in your opinion will be the per cent of recovery of the oil originally in place beneath these respective tracts with the density of drilling as it now exists on the Magnolia Fuller tract and the Sun Fuller tract?

A. The less density the more ultimate recovery but I have no way of figuring it to a figure. I am talking about relatively.

Q. You are talking about something I'm not talking about. I want to know what your opinion will be as to the per cent of recovery of oil in place beneath the Magnolia Petroleum Company's Fuller tract with the wells spaced as they now exist.

A. It has already been over 100% but I am not saying what it will be ultimately because I wouldn't venture to make—

Q. You mean they have produced more than 100% of the oil in place?

A. Probably. I haven't figured it.

Q. Then there is no oil there?

A. It is full of oil.

Q. Where did that oil come from?

A. The west side of the field.

Q. That oil will continue to come from the west side as long as there is a pressure gradient from west to east?

A. At a rate depending on the density.

Q. What will be the per centage of recovery of the oil now in place under that tract with its present density?

A. I don't know. I can only give evidence as to what the ultimate recovery relatively would be under the rate of withdrawal. That is what our information on the field has demonstrated. I could answer only relatively.

Q. Why do you say there will be less ultimate recovery if there is a greater density in the field?

A. Because the pressure in the field has so shown.

Q. In what way?

A. I have already told you and if you can't understand it. I can't help it.

Q. Do you know what the number of barrels of oil was that was produced in 1934 in that field?

A. I will refer you to the Railroad Commission's records and it is so stated in each one of the wells in the

East Texas field that it has been demonstrated that the reservoir energy depends on the rate of withdrawal.

Q. I will ask you to answer my question. Do you know what the amount of production was in number of barrels from the East Texas field in 1934?

A. No, I don't, without some records.

Q. Do you know the number of wells drilled in that field in 1934?

A. No, not without consulting records.

Q. Do you know what the number of barrels of oil were that were produced from the East Texas field in 1935?

A. No.

Q. Do you know the number of wells which were drilled in that field during that year?

A. I have that information in my files but not here.

Q. Do you have it with you?

A. No.

Q. Do you know the number of barrels of oil produced from the East Texas field in 1936?

A. No.

Q. Do you know the number of wells producing in the East Texas field in 1936?

A. No. I don't have that with me in my mind.

Q. I will ask you that same question with respect to 1937.

A. I don't remember the exact figures. I have the figures of the Railroad Commission for this year.

Q. You weren't able to give us that information for 1937?

A. No. I can't give those figures right now.

Q. Isn't it a fact that there were more wells drilled and producing in the East Texas field in 1937 than there were in 1934?

A. Yes, there certainly were.

Q. Isn't it true that the density of drilling in the field increased every year from the beginning of the field on down to the present time?

A. Yes.

Q. Isn't it true that per million barrels of oil produced each year from this field that the pressure decline has been less as the number of wells drilled in the field has increased?

A. That isn't the reason for it.

Q. I just asked if that isn't true.

A. Its truth may be a coincidence—

Q. Is that or not true?

Mr. Jeffrey:

Let the witness explain it.

Mr. Pollard:

I am willing for him to qualify it but I want him to answer it.

A. They are not interrelated. It is two separate truths.

Q Is it or not true that the decline in pressure has been greater as the number of wells drilled in the field has increased?

A. At times it has been greater and at times it has been less. It depends on the withdrawals.

Q. Comparing the decline in pressure per million barrels of oil produced in 1933 and 1934 with the decline in pressure per million barrels of oil produced in 1937, isn't it true that that decline in pressure has lessened as the number of wells have been increased when you compare it per million barrels of oil produced from the field?

A. I have never made such a study because they are not related things.

Q. The withdrawal proposition for the utilization of pressure is a matter with respect to the potentials or the

amount of daily withdrawals from the field as a whole, isn't that true?

A. The pressure and production from the field as a whole are related, yes.

Q. And the pressure build-up or decline with respect to the daily withdrawal from the field as a whole is one and the same so far as the control of the rise or lowering of the pressure is concerned, isn't that true?

A. I didn't understand the question.

Q. I will state it this way. The pressure decline or increase is governed by and controlled by the number of barrels of oil or the volume of oil permitted to be withdrawn from the field on any given day as a whole?

A. There is a direct relation between the daily withdrawals of fluid from the field and the drop in the pressure per unit of production.

Q. Then the spacing of wells has nothing to do with that pressure decline save as it might or might not increase the daily withdrawals of oil from the field as a whole; isn't that true?

A. The spacing of wells?

Q. And increased density.

A. That is a different thing. Which do you mean?

Q. I mean them both.

A. You take the field and increase the density under the same method of production?

Q. Yes.

A. You mean you will increase the withdrawals from the field then?

Q. No.

A. Then how do you do it?

Q. You have the same top allowable from the field and increase the number of wells in the field but still maintain the same top allowable and you will still have the same ratio in pressure, will you not?

A. I don't know. We haven't had that in the East Texas field. Not since the marginal well law has the effect it has.

Q. Since the beginning of the field the density of drilling in the field has increased, hasn't it, because of the drilling of an increased number of wells each year?

A. Yes.

Q. The top allowable or production daily from the field has varied from time to time, hasn't it?

A. Yes.

Q. The ratio of the pressure has been with respect to the top allowable of the field and not with respect to the number of wells drilled in the field, hasn't it?

A. The proportional decline of pressure per unit of production do you mean?

Q. I think my question speaks for itself, Mr. Collingwood.

A. Your wording is ambiguous.

Q. If you can give me that answer, I will appreciate it. I want you to be a little more specific.

Mr. Jeffrey:

He asked for a specific question.

A. Repeat the question and I will try to word the answer differently.

Q. The maintenance of the pressure can be and has been accomplished by means of limiting the top allowable withdrawal daily from the East Texas field, hasn't it?

A. Yes.

Q. Then if that top allowable is maintained so as to maintain your pressure so that there will be only a normal decline, the drilling of additional wells would not affect the pressure, would it?

A. There would still be a little tendency to lower the ultimate production of the field.

Q. Why?

A. Because you are increasing the number of points at the bottom of the wells where the pressure is locally lowered and any increase of the amount necessary to produce in the field will cause loss of oil where the pressure is locally lowered; it doesn't do too much but does do some harm to the reservoir as gas is hastened out of solution and it increases the viscosity.

Q. Under that answer there would not be any increase per million barrels of oil produced, would there?

A. Well, you wouldn't catch it from day to day and from month to month but the over-all picture would have a greater decline in pressure.

Q. Where do you mean, the over-all picture, if you don't balance it from day to day or month to month?

A. It will be there.

Q. You balance it with an invisible balance and write with invisible ink and it is there?

A. Over a long period of time you could produce the East Texas field under one condition and then produce it under another condition and it would then be evident.

Q. In any event, as I understand your testimony, the pressure is maintained or declines in proportion to the withdrawals from the field as a whole?

A. Yes.

Q. And if the whole amount of withdrawals is limited and controlled to the amount whereby pressure can be maintained, it is true, isn't it, that the number of outlets through which the oil is withdrawn is immaterial or its effect on the pressure is immaterial but it is the total withdrawal?

A. Subject to the permeability and porosity of the sand which determines the drainage of fluid to the wells.

Q. Then if you spread that drainage in a more uniform manner you spread the uniform conditions and the uniformity of pressure throughout the field which is the ideal situation you are seeking for.

A. You drill on uniform spacing and have uniform withdrawals to get optimum conditions.

Q. That is all.

Mr. Jeffrey:

I have no further questions.

Mr. Stayton:

The Atlantic adopts all the protests made.

Mr. Pollard:

I want to point this out with respect to our contentions in reply to their three legal matters, Mr. Examiner. That is with respect to the pendency of the suit as concerns the first Hammond permit. We point out first that that permit has long since been abandoned and does not exist. Second, that the Commission's files and our evidence here disclose that there has been a material change in the conditions with respect to the well drilling pattern throughout this area whereby under the New Process case, the Commission has jurisdiction to determine the necessity of these applications for the prevention of waste and the prevention of confiscation of property. Likewise with respect to the judgment in the case of Magnolia et al vs. Mamie S. Hammond and the Railroad Commission we point out that the Commission's records disclose and the records introduced disclose that the conditions with respect to drilling in this area have changed through the drilling of numerous other wells on the Sun and Magnolia tracts since the delivery of the judgment in the Hammonds case since the Commission has the jurisdiction to determine the necessity of the wells here applied for as necessary to prevent waste and prevent confiscation of property. We have previously mentioned before and again reiterate our position with respect to the pressure decline since the Cammack application. We say that under the authority

of the New Process case by the Supreme Court the Commission in its order denying that well cannot constitute res adjudicata by that hearing and now have jurisdiction to pass on these present applications as respects their necessity for the prevention of physical waste and to prevent confiscation of property which we again emphasize as we believe the evidence has shown that we seek these wells to prevent physical waste of oil and gas through the recovery of oil and gas from large areas where it is not and will not be an efficient drainage by virtue of the wells now drilled in the absence of our wells applied for but if these four wells are granted in those areas, large amounts of oil will be produced and recovered which otherwise would not be produced and recovered which affords an ample basis for the granting of each of these four applications both as being necessary to prevent physical waste of oil and gas and for the prevention of confiscation of property.

Mr. Copeland:
Anything further? Case submitted.

The State of Texas,
County of Travis.

I, Louise Kirk, an employee of the Oil & Gas Division of the Railroad Commission of Texas, do hereby certify that the above and foregoing is a true and correct transcript of my notes made at the hearing held in Austin, Texas, at 2:00 P. M., August 15th, 1938, covering the application of G. E. Burford for special permit to drill wells Nos. 1, 2, 3, and 4 on the W. L. Fuller 2.33 acre tract in the D. Sanchez Survey, Gregg County, Texas, to the best of my skill and ability.

Witness My Hand on this the 22nd day of April, A. D. 1939.

(Signed) LOUISE KIRK.

Subscribed And Sworn To before me, a Notary Public in and for Travis County, Texas, on this the 22nd day of April, A. D. 1939.

(Signed) ROSE MODRALL,
Notary Public in and for
Travis Co., Texas.

(Seal)

316 PLAINTIFFS' EXHIBIT No. 19.

Railroad Commission of Texas

Oil and Gas Division

Case No. 26,868, Rule 37.

In Re: Application of G. E. Burford for Special Permit to Drill Wells Nos. 1, 2, 3, 4, on the W. L. Fuller 2.33 Acre Tract in the D. Sanchez Survey, Gregg County, Texas.

Rehearing Held in Austin, Texas, State Capitol January 31st, 1939, 9:30 A. M.

Before: Stanford Payne, Chief Deputy Supervisor, J. D. Copeland Jr., Examiner.

Record prepared by: Louise Kirk, Oil & Gas Division, Railroad Commission, Austin, Texas.

Appearances:
Gordon Griffin,
Austin, Texas,
Representing: G. E. Burford, Applicant.

J. B. Robertson,
Austin, Texas,
Representing: Magnolia Petroleum Co., Protestants.

Ireland Graves,
Austin, Texas,
Representing: The Atlantic Refining Co., Protestants.

C. B. Jeffrey,
Austin, Texas,
D. M. Collingwood,
Dallas, Texas,
Representing: Sun Oil Co., Protestants.

Mr. Jeffrey:

I have a preliminary objection to urge, Mr. Examiner. We object to the proceedings in this hearing because in Case 53915 there is now pending in the District Court of Travis County a suit attacking the permit granted to Mamie Hammonds on this same strip. Said suit is now pending in such Court and since the judicial branch of the Government has jurisdiction over the right to drill or develop this strip we submit that the administrative body, the Railroad Commission, is without jurisdiction and call your attention to the fact that in this same file No. 26,868 the statement of Mr. George H. Templin, Clerk of the District Court of Travis County, advises that such suit styled Sun Oil Company vs. Railroad Commission et al is still pending and not disposed of by final judgment and is pending on the docket of the 98th District Court. That was a letter secured for the last hearing and if you would like an additional letter stating that it has not been dismissed—from my own personal knowledge I know we have not dismissed it—We would be glad to furnish that information to you. I will state all my objections so that you

can rule on all the preliminary objections at the same time. We would further object to the consideration of these applications for the reason that in Cause No. 54769 in the case styled Magnolia Petroleum Company et al vs. Mamie Hammonds, a final judgment permanently enjoining the drilling of a well on this same strip has been entered and that judgment has now become final. We therefore insist that such judgment is res adjudicata.

Mr. Graves:
That is in what Court?

Mr. Jeffrey:
In the 53rd District Court.

Mr. Robertson:
Magnolia Petroleum Company adopts that protest or plea in abatement.

Mr. Graves:
The Atlantic Refining Company also adopts it.

Mr. Robertson:
I would like to add to the protest with regard to the final judgment enjoining the operation or drilling of the well in question that it is my understanding and we contend that there has been no change in conditions in this area which would justify the Railroad Commission or the Courts in setting aside this injunction or proceeding otherwise than in compliance with it.

Mr. Griffin:
It is the applicant's contention that the Commission has already ruled on whether or not a rehearing is justified or whether it isn't and has taken judicial knowledge of all the facts in this case and ruled that a rehearing is proper and therefore that case is settled by the granting of the

rehearing by the Commission. Relative to the trial now pending in the District Court I would like at this time to introduce in the record the record of all prior hearings on this case. This same point was brought up in prior hearings and in each instance the Commission has overruled the consideration of the trial now pending in the District Court and that trial was pending at the time the previous hearings were had and the applicant was given permission to proceed with the hearing in view of the pending Court trial; therefore there is no condition changed from that on that account at this time than was in effect at the time of the previous hearing. The law has changed considerably since the Hammond Court trial and there have been numerous cases before the Courts and judgments have been entered that change the law from what it was at the time the original Hammonds application was applied for. I would like to have one of the lawyers familiar with the proceedings in that case to state what that case found and if they don't, I would like to enter the judgment of the Court.

Mr. Robertson:

The Supreme Court in that case held that a permanent injunction granted by the District Court restraining the drilling of a well was still operative and specifically so stated in it until conditions were changed which would justify the granting of the well; in other words that the judgment of a permanent injunction is based on the facts as they existed at the time that the injunction related to which is as of the time that the order is granted. They held therefore in effect that whenever it was shown that conditions had so changed that the well would now be justified though formerly it had not been that the Railroad Commission had the jurisdiction to determine that fact and if they found that conditions had so changed they had jurisdiction to go ahead and grant a permit in spite of the previous Court judgment.

Mr. Jeffrey:

There wasn't a question of subdivision in violation of the rule involved in that case?

Mr. Robertson:

No. It was a straight out question of whether the Commission had the right to grant the wells after the Court had canceled the permit previously granted and enjoined their operation. There was a subdivision question in the original case but they didn't go into it in the one which he is talking about. That is my understanding of the holding. I could be mistaken about it but that is the way I interpret it. It was also said in that judgment although I don't really think that the Court meant to hold it that the Railroad Commission has the exclusive jurisdiction to determine whether jurisdiction to determine whether jurisdiction had changed. That statement was made but I hardly think the Court would mean that the District Court could not—

Mr. Graves:

They meant originally.

Mr. Robertson:

I don't think that there is much question but that the Court which has granted the permanent injunction would have the right to entertain an order showing changed conditions and set aside that order. That is the rule in all injunction cases. They couldn't grant the permit but could set aside the injunction and leave the applicant free to come back to the Railroad Commission and make another application unembarrassed by the judgment. I would like to have our objection ruled on.

Mr. Copeland:

Since the Commission set the case for hearing, we will go ahead and hear the testimony on it and we will sub-

mit to them your objection to the jurisdiction of the Commission as to considering it.

Mr. Robertson:

I would like to have the question as to evidence as to changed conditions passed on as a preliminary to the consideration of the application. As I understand it, there has been no evidence offered. I take the position—I don't know whether any body joins in it—that the Railroad Commission must first in a public hearing hear evidence as to whether or not conditions have changed since the Court judgment was entered and find that there has been a change in conditions which would now justify a well before they have any jurisdiction to proceed any further because of the Court judgment which stands in the way and somebody has to find that the conditions exist which make the Court judgment inoperative before the matter can be proceeded with. I make that objection for the Magnolia.

Mr. Copeland.

We will overrule that objection.

Mr. Griffin:

This is the application of G. E. Burford to drill well No. 1, 2, 3, and 4 on the W. L. Fuller lease located in the Sanchez Survey, Gregg County, Texas. This application is sought for the following reasons: First, I would like to introduce in evidence a duplicate of the plat which is now on file with the Commission and mark this as plaintiff's Exhibit No. 1.

Mr. Copeland:

The map with the circles on it will be marked Applicant's Exhibit No. 1.

Mr. Griffin:

On this map or plat I have drawn in orange color circles with a radius of 330 feet around each well. I have drawn in green a radius of 330 feet around each of applicant's four wells and have colored in red that portion of the W. L. Fuller lease that would otherwise be further than 330 feet from any drilled, drilling or producing well and would be at a less distance than 330 feet from any producing well should the four wells of applicant be drilled. In other words, the drilling of the four wells on the applicant's property would cause that portion of the Fuller lease colored in red to be drilled to a density in conformity with Rule 37 of the Railroad Commission as set forth in the East Texas field. And it is my opinion that the drilling of these wells would recover oil which would otherwise not be recovered by any of the wells now drilled by reducing the drainage area to less than 330 feet and cause a larger per cent of the oil underneath this area to be recovered ultimately.

Mr. Robertson:

Magnolia Petroleum Company objects to that statement with regard to the recovery of more oil by drilling at closer spacing distances than 330 and 660 feet on the ground that it constitutes a collateral attack on Rule 37 which the application cannot make, having appeared before the Commission with the request that an exception to that rule be granted.

Mr. Jeffrey:

We join in the objection and ask that the statement be stricken for the reasons urged.

Mr. Griffin:

That isn't an attack on Rule 37 as that will bring the red area down to a distance to conform to Rule 37. That

red area is a distance beyond 330 feet from any drilling or producing well in that area.

Mr. Copeland:
His objection was based on your statement that the closer you get the wells the more oil you will get.

Mr. Griffin:
That is my opinion. If the Commission wants to overrule that, it's all right but it is my opinion it will recover oil which would otherwise not be recovered.

Mr. Copeland:
We will overrule the objection.

Mr. Jeffrey:
Each of the proposed locations is less than 660 feet from some other well or property?

Mr. Griffin:
Yes, sir, but it brings the distance down closer—

Mr. Copeland:
Is it closer than 660 feet?

Mr. Griffin:
Yes. I would like to offer in evidence a plat showing the area of the Fuller lease and have it marked as our Exhibit No. 2.

Mr. Copeland:
It will be received and marked applicant's Exhibit No. 2.

Mr. Griffin:
I have now taken an area around and adjacent to the Fuller tract, and 8 times area around the entire Fuller

102 acres tract. East of the Fuller tract it is dry. It is on the eastern limits of the field and therefore I cut out the three eastern areas, leaving six areas to be used for density comparison. The 8 times area of the Fuller Tract would have a density of 1 well to 6.1 acres whereas the density of the Fuller tract at this time is 7.7, and the requested density is 6.0 acres as compared to the eight times area of 6.1.

Mr. Copeland:
Did you use all that Fuller Tract? How many acres?

Mr. Griffin:
100 acres.

Mr. Copeland:
I thought it was 102 acres.

Mr. Griffin:
It would make only a slight difference. It is incorrect to that extent.

Mr. Copeland:
How many acres did you use in the 8 times area after cutting out that part?

Mr. Griffin:
800 minus 300 or 500 acres.

Mr. Copeland:
You used 500 acres?

Mr. Griffin:
Yes.

Mr. Copeland:
How many wells?

Mr. Griffin:

82 wells. That gives a density of 6.0 acres per well. I would like to introduce that statement in evidence.

Mr. Copeland:

It will be applicant's Exhibit No. 3.

Mr. Griffin:

It is also the applicant's contention that the sand conditions in this area are not the same as at this time by the Engineering Department's work in checking the area they have found that the Sun Oil Company No. 5 Fuller is a pumping well. That is located 277 feet west of the west line of applicant's property. Likewise they have found that the Magnolia Petroleum Company's wells Nos. 1 and 3 on their lease are pumping wells, showing— and that the remaining wells on the tract are flowing wells, showing that there are flowing wells and pumping wells and that the said conditions are not the same in the area. That is all.

Mr. Graves:

Let me ask a question about this density statement. I understand that you took an area 8 times the area of the Fuller tract but that you took it all to the west and none of it to the east?

Mr. Griffin:

That is right.

Mr. Graves:

If you had taken an area 8 times the area of this tract, what would have been the extreme distance of that area from the strip? What would have been the distance of the outer margin of that area from the strip? How far would it have been if you had taken that 8 times area all the way around?

Mr. Griffin:

It would have been—

Mr. Graves:

I will ask it this way. Is this line the same distance from this strip that it would have been if you had taken the entire area all around instead of all on one side of it?

Mr. Griffin:

Yes, it would have been. The distance to the east line of the 8 times area would have been the same distance from the east line of the strip as the west line of the red area is to the west line of applicant's strip.

Mr. Copeland:

He took the 3 times area and then disregarded the eastern part.

Mr. Griffin:

Which is non-productive at this time.

Mr. Jeffrey:

As I understand it, you are asking for four wells on this tract, four more wells?

Mr. Griffin:

Yes.

Mr. Jeffrey:

Making a total of 17. You say that is 6 times into 100?

Mr. Griffin:

It lacks 2 acres. It is 5.99, closer to 6 than to 6.1 or 5.9. It would be 5.88, I believe, 17 times 6 is 102. I will stand corrected to that extent.

Mr. Jeffrey:
As I understand it, you offered all the testimony in the previous hearings. Let's see if I have it clear to keep from duplicating. That is what you did, offered the testimony in the previous hearings?

Mr. Griffin:
Yes.

Mr. Jeffrey:
In addition you offered first a map showing 330 foot radius and the 330 foot radii around the offset wells are colored in orange; is that right?

Mr. Griffin:
Yes.

Mr. Jeffrey:
And those are the same circles which were heretofore presented by you?

Mr. Griffin:
Yes.

Mr. Jeffrey:
You have changed the location of these four wells slightly from the previous applications?

Mr. Griffin:
I didn't change them. The applicant did.

Mr. Jeffrey:
They have been changed?

Mr. Griffin:
Yes.

Mr. Jeffrey:
Do you remember how much they have been changed?

Mr. Griffin:
No, sir, I don't.

Mr. Jeffrey:
The only difference in your Exhibit No. 1 and the former exhibit is that you drew the 330 foot radii from the new locations whereas the 330 foot radius before was with reference to the old location?

Mr. Griffin:
Yes.

Mr. Jeffrey:
They are the same radius of 330 feet?

Mr. Griffin:
Yes.

Mr. Jeffrey:
As I recall, Mr. Griffin, your testimony in the previous hearing was to the effect that if direct equidistant offsets were drilled to these locations, if all of them were granted, it would cause at least 16 offsets; is that still true?

Mr. Griffin:
Yes.

Mr. Jeffrey:
Or a total of 20 wells?

Mr. Griffin:
Yes. You are positive that is what it showed?

Mr. Jeffrey:
I just re-read my notation on it.

Mr. Robertson:
I'd like to ask a few questions.

Questions by Mr. Robertson; Answers by Mr. Griffin:

Q. Mr. Griffin, treating the entire Fuller tract consisting of approximately 102 acres as one tract and assuming that three wells are to be drilled on that tract, isn't it your opinion that those three wells should one of them be placed on the Sun Oil Company lease some little distance west of the Mamie Hammond claimed strip and another one should be put on the Magnolia Petroleum Company lease about 300 to 330 feet east of that strip? Before you answer let me ask this. Isn't it true that the distance from the well No. 6 of the Sun Oil Company to this location No. 3 is more than 660 feet?

A. Yes, sir.

Q. Therefore that will leave an area in there that is more than 660 feet, some portion of which will be more than 660 feet from any producing well from east to west?

A. No, sir. Bear in mind.

Q. I am leaving out No. 7 and No. 5 to the south. I am just considering these two wells.

A. That is right.

Q. Wouldn't it be your opinion that if two more wells are to be drilled on that tract considered as a whole, the Sun Oil Company lease and the Magnolia lease and the strip in between or the alleged strip, that one of those wells should be put on the Sun Oil Company lease approximately 330 feet west of well No. 3 or some such distance and another one on the Magnolia Lease approximately 330 feet east of the well No. 3?

A. No, sir. I will tell you why.

Q. Why?

A. The distance between the applicant's No. 3 well and well No. 7, and well No. 7 and well No. 6 on the Sun, and well No. 6 and well No. 4 on the Sun, and well No. 5 and well No. 5 on the Sun is about the same distance apart.

Q. How far is it from well No. 7 of the Sun to well No. 5 of the Sun; that is over 660 feet, isn't it?

A. Yes, but—

Q. All right. Then if you leave Sun wells 6, 7, and 5 and put your well No. 3 there you will leave some little portion in there which could--a place where that well could better be located?

A. Yes. If you would move that location 50 feet west it would tend to wipe out that little portion.

Q. That would put it off the strip?

A. Yes, but at the same time by moving it west you would likewise increase the area to the east. You would increase the strip to the east.

Q. Isn't it your opinion, assuming that two wells are going to be put on that strip that one of them should be a little bit west of the strip and another one east of the strip on the Magnolia tract?

A. I would say that would be a good idea.

Q. A better location. All right.

A. But I will say that the drilling of these wells will cause a reduction of that area.

Q. But the other locations would be better in your judgment?

A. The other locations would tend to minimize it.

Q. Isn't it true that the diagonal distance with a square 660 feet on each side from each corner to the center is approximately 462½ feet?

A. That is true of a square 330.

Q. 660 feet.

A. That is right.

Q. The diagonal distance is 462½ feet?

Mr. Jeffrey:
466 feet.

A. 466 feet, yes.
Q. Even?
A. 466.66.
Q. That is all.

Mr. Copeland:
On this density statement where you have taken in all the Fuller tract, did you secure permission from the lease owners of the other parts of the Fuller tract to use their portions of it in applying for permits?

Mr. Griffin:
No, we did not. Our contention is that if a lease is undeveloped and we have a chance to come in and develop it, we are entitled to that privilege if we apply first.

Mr. Copeland:
We will recess for about five minutes.

Mr. Jeffrey:
Mr. Collingswood has heretofore testified but it might be well to bring it up to date. Mr. Collingwood, the records show that on September 22, 1938, this application of G. E. Burford for four wells was denied. As I recall it, the well which you test monthly on that lease is the Sun No. 1 Fuller. Is that right?

Mr. Collingwood:
Yes.

Mr. Jeffrey:
The last test period after the denial of this permit in September 1938 was when? When did you next test that well?

Mr. Collingwood:
October 1, 1938.

Mr. Jeffrey:
Have you tested it monthly since that date?

Mr. Collingwood:
We have.

Mr. Jeffrey:
What is the difference in the bottom hole pressure between your last test—when was that?

Mr. Collingwood:
Jan. 1, 1939.

Mr. Jeffrey:
What is the difference in bottom hole pressure in the Sun No. 1 Fuller January 1st, 1939, as compared with October 1, 1938?

Mr. Collingwood:
Just exactly the same; 1085.

Mr. Jeffrey:
Your conclusion from the conditions of that test is the same as it was in the previous hearing?

Mr. Collingwood:
Yes. It shows a great degree of pressure maintenance and little drop in pressure.

Mr. Copeland:
In making these bottom hole tests what do you use, the bomb method?

Mr. Collingwood:
Yes, the bomb method.

Mr. Jeffrey:
You use the same type bomb the Commission does? in making your tests?

Mr. Collingwood:
That is correct.

Mr. Jeffrey:
That is all.

Questions by Mr. Griffin as follows:

Q. I would like to ask one question. Since that pressure is maintained, the same pressure, over a period of four months—it is normal for pressure to drop when oil is produced, isn't it?

A. The pressure will vary in the rate of decline according to the production from the field as a whole and if the rate of production per acre in the local area is the same as in the field as a whole, if the condition is the same as the average over the field, the pressure decline will depend on the rate of production from the field as a whole and the rate of production in the localized area.

Q. But the average field pressure is declining as oil is produced, isn't it?

A. It is subject to fluctuations and sometimes rises and sometimes falls.

Q. Normally they fall over a period of time?

A. Yes.

Q. If this pressure isn't falling and you drill additional wells and it starts falling, that would be normal, wouldn't it?

A. It wouldn't be normal if the rate of production for the local area is in excess of the rate of production from

the field as an average, the average rate of production in the field.

Q. What is the amount for the field?

A. The overall pressure in this local area has shown the same fluctuations as the field as a whole and in the aggregate over a period of four years the loss of pressure in our key well has shown less drop in pressure than the field as a whole, the average for the field.

Q. So you should drill more wells to make that drop in conformity with the field or increase the allowable for the wells?

A. Not unless the rate of production per acre is less in the local area than on the field or the average of the field.

Q. Is the rate of production per acre less or more?

A. It is about the same now. With many additional wells the production per acre would be much greater.

Q. If it is the same now and you don't have any drop you should increase either the allowable or the number of wells to make it drop in conformity with the field drops.

Mr. Jeffrey:

Do I understand your hypothesis, Mr. Griffin, to be that it is desirable to have a drop in bottom hole pressure?

Mr. Griffin:

I haven't submitted any hypothesis but just asked that question.

A. I would say that the contrary would give the best effect and the greatest production from the area; the greatest ultimate oil would be in accordance with the lowest drop in pressure.

Q. To reduce the allowable?

A. It would increase the ultimate production.

Q. To reduce the allowable would increase the ultimate production?

A. Reduce the pressure drop and it would increase the ultimate production.

Q. If it didn't have any pressure drop, how would it reduce it?

A. It has some over-all.

Q. You said over the last four or five months there hadn't been any.

A. That is right.

Q. That is all.

Mr. Jeffrey:

Mr. Collingwood, from the Questions I wasn't sure whether the Commission understood. It isn't your testimony that it is desirable to use any of the pressure in the production of oil?

A. No. The most production, the most ultimate production obtainable would be from no pressure drop.

Mr. Jeffrey:

The ideal would be to have no pressure drop?

A. That is true.

(Griffin):

If you drilled an additional well in that area, wouldn't it tend to cause or cause a pressure drop in the area?

A. I don't suppose one well would.

Q. Would four wells?

A. Possibly.

Q. Four wells in no case would cause an abnormal pressure—

A. If you are assuming that the production from this area will be stepped up in accordance with the per well allocation—

Q. Under the present Commission allowable.

A. You would tend to have a pressure drop in the area by drilling four wells. You would expect to get an increased rate of pressure drop.

Q. But you don't think that the drilling of four wells would cause a pressure drop in the area to exceed the average drop in the pressure for the entire field?

A. If the effect of 4 wells drilled on the localized area will effect the whole field, the average of the whole field?

Q. Would it effect the average drop in this area to more nearly conform to the average drop in the pressure for the entire field?

A. It would decrease the efficiency in this area.

Q. I didn't ask that. I asked if it would cause a pressure drop from that key well to be more nearly in conformity with the pressure drop for the entire field?

A. Over a period of time it would probably increase it.

Q. I mean over—say that the wells were drilled in October when you had the pressure drop and were producing at that time—

A. I couldn't say what might have happened under those changed conditions.

Q. That is all.

Mr. Copeland:

Any more questions from Mr. Collingwood?

Questions by Mr. Robertson as follows:

Q In your opinion, treating the Sun Oil Company's 50 acre lease and the Magnolia Petroleum Company's 50 acre lease and the applicant's alleged strip as one body of land, assuming that three wells were to be granted thereon, is it or not your opinion that one of them should be granted west of the strip, the alleged strip, and between the Sun No. 7 and No. 5 and one or possibly two should be granted east of the strip between Magnolia No. 6 and No. 5 and one possibly east of the strip and some point north of the Magnolia No. 6. Is that or not your opinion assuming that three or four wells are to be granted and drilled on

that entire area treated as one area without regard to any different ownerships?

A. All I can say is that I don't consider any wells necessary; that any additional wells are necessary to drain all the oil from this whole tract; but if wells were to be put down there they should naturally be put—you would select places which had the greatest average distance from the surrounding wells.

Q. And none of those locations would fall on this strip?

A. I don't suppose they would. I haven't checked up on the measurements but it looks as if they would not.

Q. That is all.

Mr. Jeffrey:

That is all.

Mr. Robertson:

As I understand it, you reiterate all the testimony you have given in the previous hearings on applications for wells on this same strip?

A. Yes.

Mr. Robertson:

Without having it repeated at this time.

Mr. Graves:

I understand that is all in the record.

Mr. Griffin:

Yes.

Mr. Robertson:

I just wanted to know if he still stood by his former testimony. Magnolia Petroleum Company protests the granting of the wells on the ground that there is no

justification at all shown for an exception and further says that it strenuously objects to the alleged owner of this strip using its lease as a justification for drilling wells on somebody's else's land if they own any land and further say that they do not concede on behalf of Magnolia that the applicant owns any title whatever in this strip because the question as to whether the 50 acre subdivision on the east and the 100 acre subdivision on the west would leave any strip between them would depend on a survey made under the field notes of the entire tract. It may be that the fences around this supposed 100 acre tract actually included 102 acres but the field notes did not and therefore we do not make any concession that the applicant has any title whatever but simply contend that there is no basis for the granting of an exception to drill any of these wells.

Mr. Jeffrey:

We urge, Mr. Examiner, as a reason for denying these locations the reasons heretofore urged in the previous applications and also at the outset of this hearing and would call your attention to the fact that from the best information obtainable there has been no change in the reservoir conditions in this area since the Commission last denied these locations, while if there has been a slight change as this witness testified there has been a drop in pressure, it is to be expected over-all and there has been no change in the last four months. We call your particular attention to that fact as an additional reason why the action of the Commission in denying the Cammack application and the Buford application previously heard should be continued and that these locations should be again denied.

Mr. Griffin:

Applicant would like to say that the changed conditions for one thing would be that normally you would expect a drop in pressure within the area and since the last ap-

plication was heard up to the present time there has been not a pound drop in pressure from the testimony of their own engineer that certainly constitutes a changed condition and an abnormal condition in that area.

Mr. Jeffrey:
We say that it is a healthy condition.

Mr. Griffin:
I say it is a changed condition.

Mr. Graves:
The Atlantic Refining Company joins in the protest and adopts the objections made by the Magnolia Petroleum Company and the Sun Oil Company.

Mr. Copeland:
Anything further for the record? Case submitted.

The State of Texas,
County of Travis.

I, Louise Kirk, an employee of the Oil & Gas Division of the Railroad Commission of Texas, do hereby certify that the above and foregoing is a true and correct transcript of my notes made at the hearing held at 9:30 A. M., January 31st, 1939, on the application of G. E. Burford for special permit to drill wells Nos. 1, 2, 3 and 4 on the W. L. Fuller 2.33 acre tract in the D. Sanchez Survey, Gregg County, Texas, to the best of my skill and ability.

Witness my hand on this the 21st day of April, A. D. 1939.

(Signed) LOUISE KIRK.

Subscribed and Sworn to before me, a Notary Public in and for Travis County, Texas, on this the 21st day of April, A. D. 1939.

(Signed) ROSE MODRALL,
Notary Public in and for
Travis Co., Texas.

340 PLAINTIFFS' EXHIBIT No. 20.

Railroad Commission of Texas,
Oil & Gas Division.

In Re: Application of G. E. Burford for Special Permit to Drill Wells Nos. 1 to 4 inclusive on the W. L. Fuller 2.33 Acre Tract in the D. Sanchez Survey, Gregg County, Texas.

Case No. 26,868, Rule 37.

Rehearing Held in Austin, Texas, State Capitol, May 19th, 1939, at 10:00 A. M.

Before: J. D. Copeland, Jr., Examiner.

Record prepared by: Louise Kirk, Oil & Gas Division, Railroad Commission, Austin, Texas.

Appearances:

Gordon Griffin, Austin, Texas, Representing: G. E. Burford, Applicant.

Suzette Meyer, Greenwood, Moody & Robertson, Austin, Texas. Representing: Magnolia Petroleum Co., Protestants.

J. W. Stayton, Black, Graves & Stayton, Austin, Texas. Representing: Atlantic Refining Co., Protestants.

J. A. Rauhut, Austin, Texas; Martin Row, Dallas, Texas; A. S. Rhea, Box 907, Tyler, Texas. Representing: Sun Oil Co., Protestants.

Mr. Copeland:

We have two motions in this case, one by G. E. Burford to rehear wells Nos. 1, 3, and 4, and also one by the Sun Oil Company to rehear well No. 2. The only ground stated by the applicant on wells 1, 3, and 4—

Mr. Row:

I believe the applicant asked for a rehearing on all four of them. In his opening paragraph he requests a rehearing on all four wells numbered above, including wells 1, 2, 3, and 4.

Mr. Copeland:

In his prayer he states it is wells 1, 3, and 4.

Mr. Griffin:

We aren't requesting a rehearing on well No. 2. We didn't request one on No. 2.

Mr. Copeland:

The only thing he asks to put in the record is the decision of the Century case and that unless all the wells are granted, he wouldn't recover his fair share of the oil. That is all that he has to put in the record. The motion by the Sun Oil Company states four reasons. One of them is the jurisdiction of the Commission and another one is that they thought the case was already settled because they had a permanent injunction, and the next one was waste and the last one is the question of subdivision. That is all that we will consider this morning.

Mr. Rauhut:

Who shall proceed first? The applicant is asking for three and we are asking for cancellation of one.

Mr. Griffin:

I believe protestants' motion was filed first.

Mr. Copeland:

Applicant's motion was received April 5th and protestants' motion was received April 6th.

Mr. Griffin:

I think it would be in line for them to put on their evidence to show why they wanted a rehearing on the other one.

Mr. Copeland:

What do you have to present?

Mr. Griffin:

All we are asking to do is put in the decision in the Century case and they say that the wells will create waste but we have ever made any such contention.

Mr. Copeland:

You don't have anything in your motion for rehearing except the Century case aside from what you put in at the former hearing?

Mr. Griffin:

That is right. In the last hearing we put on engineering testimony and you have had legal testimony put on at the previous hearings. The protestants have never put on any engineering evidence.

Mr. Rauhut:

We have at each hearing.

Mr. Griffin:

Therefore I think if they want a rehearing to rebut the unrebutted testimony at the previous hearings, now in their opportunity to put it on because our evidence has been put in in a clear and distinct manner and there has been no evidence submitted in any hearing to rebut any of the evidence which we have submitted.

Mr. Copeland:
The only thing, the only additional thing which you have to offer is the decision in the Century case?

Mr. Griffin:
Yes.

Mr. Copeland:
Do you have any objection to him offering that?

Mr. Griffin:
That is unless they put on evidence when I would like to cross examine them.

Miss Meyer:
What do you have reference to in the Century case.

Mr. Griffin:
The whole thing.

Miss Meyer:
Holding what?

Mr. Griffin:
Whatever it holds. I think that the decision will speak for itself.

Miss Meyer:
Mr. Examiner, I think that the applicant should state what it is he is basing this on. I am not familiar with just what phase of the case he is basing it on. He just says the Century case. I think he should be more explicit.

Mr. Copeland:
Is there more than one Century case?

Mr. Griffin:
Just one.

Mr. Rauhut:
I guess he has reference to the opinion of the majority of the Court of Civil Appeals in the Century case.

Mr. Copeland:
Anything you want to take up on the applicant's motion for rehearing?

Mr. Rauhut:
There are two or three questions of proof which I would like to elicit by Mr. Gordon Griffin who has testified before the Commission on additional points which pertain to our motion for rehearing.

Mr. Copeland:
Your motion or his motion?

Mr. Rauhut:
Both of them.

Mr. Copeland:
What part of his motion?

Mr. Rauhut:
Where he says two wells are necessary to prevent confiscation of property or that all of them are necessary for that purpose. I would like to ask a few more questions bearing on this matter.

Mr. Griffin:
All our evidence has been put in. If you want to put in any evidence to rebut anything we have, now is the time to put it in. I don't think we have to put on evidence here. Our case is already closed.

Mr. Rauhut:

He says it is necessary to prevent confiscation by drilling these wells.

Mr. Copeland:

Where does he say that?

Mr. Rauhut:

I thought you read that in his motion.

Mr. Griffin:

That isn't my motion.

Mr. Rauhut:

Whose motion is it?

Mr. Griffin:

Mr. Burford's.

Mr. Rauhut:

Didn't you prepare it?

Mr. Griffin:

No, I haven't even read it.

Mr. Rauhut:

He has introduced the former hearing in which he says it was necessary on both grounds. "And applicant alleges and stands ready to prove that unless all the wells requested are granted, he will not be able to recover his fair share of the oil underlying the area in question." May I question him on that?

Mr. Copeland:

Not unless he introduces something else which wasn't introduced at the prior hearing. You can cross examine him on the Century case if you want to.

Mr. Rauhut:

Mr. Griffin, I don't know what you have reference to—do you want to swear the witness?

Mr. Copeland:

He hasn't offered himself as a witness.

Mr. Rauhut:

I want to cross examine him on that.

Mr. Copeland:

Mr. Griffin, do you have the Century decision with you?

Mr. Griffin:

No, but it is before the Commission. I feel that the Commission has knowledge of the Century case but I can get a copy of it if you want it.

Mr. Copeland:

I think we would have to have a copy before you can testify about it.

Mr. Griffin:

I can't testify to it because I'm not a lawyer.

Mr. Rauhut:

You don't know what is in it?

Mr. Griffin:

Yes, I know what is in it?

Mr. Rauhut:

Shall we consider that out of evidence or in evidence?

Mr. Copeland:

I think he can put a copy of it in the record. His opinion about it makes no difference. As far as I am concerned, I am through with his motion.

Mr. Rauhut:

Mr. Examiner, at the prior hearing Mr. Griffin offered some testimony under which he sought to justify the drilling of four wells on a density basis and he repeats in his motion that they proved at the hearing that they were entitled to all these wells and Mr. Griffin testified under oath in the Turn-bow at least once and I want this admitted or testified by him and made part of the record or else I will introduce the record itself—Mr. Griffin testified in the Turnbow case that density of drilling doesn't have anything more to do with the opportunity of a tract to get its fair share of the oil than the number of fence posts around it.

Mr. Copeland:

You say he mentions that in this motion for rehearing?

Mr. Rauhut:

No. That was in his testimony in the Turnbow hearing before this Commission.

Mr. Copeland:

Were you present?

Mr. Rauhut:

Yes. I also want to ask him if that was what he testified and make it a part of this record.

Mr. Griffin:

That is an entirely different case.

Mr. Rauhut:

If we can agree that it is his testimony, we desire to offer it at this time as his testimony. Even though it be excluded, I would like our exception.

Mr. Copeland:

Are you still on the motion of the applicant? When you get through with his motion, you can offer whatever you asked for a rehearing on.

Mr. Rauhut:

He is asking for three wells and we are asking in ours to cancel one. We are opposing his and in favor of ours.

Mr. Copeland:

We will take up only new testimony and not re-hash the former hearing. Anything not covered in that motion will not be considered. Whatever he testified and you cross-examined him on in a former hearing of this case is a part of this case but we will not rehash it. The only thing he offered new is the opinion that he has mentioned in that case. Whether it is material or not, I don't know. And the same thing applies to your motion. We will not consider anything that you did not put in that motion.

Mr. Rauhut:

That goes to both motions and I would like to offer it and if the Commission doesn't agree, then they can exclude it.

Mr. Copeland:

I am ruling on it.

Miss Meyer:

Mr. Examiner, if he is basing it on the Century case these matters are in the Century case.

Mr. Copeland:

We will not discuss the reasons back of the Century case.

Miss Meyer:
All you are going to consider is a copy of the opinion in the Century case?

Mr. Copeland:
Yes. That is all that he has offered.

Miss Meyer:
Has he put in a copy of that opinion?

Mr. Copeland:
No, but he can furnish a copy of it.

Miss Meyer:
This is the hearing and he doesn't have a copy.

Mr. Copeland:
If you don't want it in, we will rule it out.

Miss Meyer:
He says he is basing it on that.

Mr. Copeland:
Everything which you refer to in any decisions, if you don't have copies we will rule that out too.

Miss Meyer:
You say you will have the hearing limited especially to the Century case?

Mr. Copeland:
What is called for in these motions.

Miss Meyer:
What do you say is called for in the motions?

Mr. Copeland:

Of course, we have already the evidence introduced at the former hearings which we will not take up at this time as we already have it and everybody had a chance to be present at that time. The only new thing which he has is the decision in the Century case.

Miss Meyer:

And he doesn't have that.

Mr. Copeland:

If you want to exclude that, I will make the same ruling with him that I will make with you; we will not let him put it in if he doesn't have it and we will not let you put in anything you don't have here today.

Miss Meyer:

Are you going to base it merely on a copy of that opinion or on the principles of law that are discussed in that opinion and what that opinion was based on or merely admit a copy of that opinion?

Mr. Copeland:

We will take that case under consideration after we hear the application and whatever is in it we will base our opinion on. We will not try the Century case.

Miss Meyer:

The points which Mr. Rauhut is bringing out are points developed in the Century case—

Mr. Copeland:

If you have any other cases you want to submit, we will be glad to have you submit them if you think they are material.

Mr. Rauhut:

It is all right with us for Mr. Griffin to furnish a copy of the opinion in the Century case later. We may want to furnish something later too.

Mr. Copeland:

We will take up the Sun's motion now. I think we can save a lot of time by taking it up point by point.

Mr. Rauhut:

What we offer we ask that it be considered not only a part of the motion but against the applicant's motion and will not designate as we offer them.

Mr. Copeland:

Let's take up the point as to jurisdiction and the case which has already been tried.

Miss Meyer:

The Magnolia Petroleum Company makes the same request and at this time adopts all the other protests made. Before we leave the Century case I would like to ask permission to file a specific excerpt from the Century case in which in substance that case states that the holding in that case is based on the record made in that particular case.

Mr. Copeland:

That will be satisfactory.

Mr. Griffin:

I think they should file the whole case and let the whole case speak for itself and not file that one portion of it. It looks to me like the decision in that case will speak for itself, whatever it holds is what we want to offer and not any excerpt from it. It seems to me that if the

case in its entirety is filed with the Commission, they can take judicial knowledge of whatever it holds.

Mr. Rauhut:

Mr. Examiner, we desire to offer in evidence first a certified copy of the Court's opinion contained in Rule 37 file on this matter dated January 31, 1935, cause 54769, Magnolia Petroleum Company et al vs. Railroad Commission of Texas et al in the 53rd District Court, that judgment being in a consolidated case reciting that cause 54,743 in the same Court styled Sun Oil Company vs. Railroad Commission et al was consolidated with this Magnolia case for trial. In connection with that judgment and as showing the issues involved—

Mr. Griffin:

Wasn't that case filed with the Commission at the previous hearing?

Mr. Rauhut:

The judgment was.

Mr. Griffin:

Then I don't see why—

Mr. Rauhut:

They got leave to furnish copies of the pleadings but I don't believe they have been furnished. I want to reintroduce them and furnish them.

Mr. Griffin:

If they were introduced one time, I don't see any use in reintroducing them.

Mr. Rauhut:

We will get along quicker by just reintroducing them as I don't find the particular pleadings I have reference to in

the file. As showing the issues involved in that case in which that judgment was entered, we offer in evidence and ask leave to furnish the Commission a copy of the first amended original petition of the Magnolia Petroleum Company in the Magnolia case and the first amended original petition of the Sum Oil Company in Cause 54,743 which was consolidated with Cause 54,769 and tried as such. We next offer in evidence the plaintiff's original petition in Cause 53,915, Sun Oil Company vs. Railroad Commission et al, 53rd District Court, together with the certificate that is in the Commission's file already from George H. Templin, District Clerk of Travis County, to the effect that the suit is still pending as of the date of the certificate. We desire leave to furnish the Commission a copy of that petition. The case is still pending and set for trial in July of this year. I represent the plaintiff in the case and therefore I am prepared to make that statement. In our motion for rehearing we allege that this strip is a voluntary subdivision. We don't find that the title papers are in the Commission's record on this case. If they are in there, we have failed to see them. We therefore desire to offer in evidence and furnish the Commission with copies of each, first the original lease from W. L. Fuller and wife to J. A. Reynolds dated July 31, 1930, recorded in Volume 4, Page 1, of the Deed Records of Gregg County, and also the assignment from J. A. Reynolds to Mamie Hammonds covering that Fuller 100 acres more or less, dated September 15, 1930, recorded in Volume 60, Page 115, Gregg County Deed Records. Next the assignment dated December 18, 1930, from Mamie S. Hammonds joined by her husband O. O. Hammonds to Claude Bell and R. A. Gaddy conveying the leasehold estate in the east 50 acres of the Fuller 100 acres more or less. Next the assignment of the oil and gas lease dated February 28, 1931, recorded in Volume 75, Page 86, Deed Records of Gregg County, from Mamie S. Hammonds

joined by her husband to Sun Oil Company covering the west 50 acres of the above described 100 acre Fuller tract, more or less. We do not admit that the applicant has title to this strip, it being our contention that the purpose of the sale was to sell the entire interest of Mamie Hammonds in that tract by east and west halves. I would like to say that the existence of the strip has never been adjudicated in any Court as between Sun Oil Company and the other parties.

Mr. Copeland:
Do you claim title to it?

Mr. Rauhut:
The title is asserted in the case pending in the District Court, Cause No. 53915, the original petition in which has been introduced.

Mr. Copeland:
Has there been any lawsuits over the land?

Mr. Rauhut:
In that suit we prayed "that plaintiffs have judgment decreeing said strip to be part and parcel of plaintiff's leasehold estate as assigned to it and in any event that the complained of order of the defendant Railroad Commission be in all things annulled, canceled and held to be invalid."

Mr. Copeland:
Has there been any lawsuit to litigate the title?

Mr. Rauhut:
None except this one which I quoted.

Mr. Griffin:
There has not been one tried in the County Court of Gregg County?

Mr. Rauhut:
Not that I know of.

Mr. Griffin:
That is where it would be tried if it was a dispute as to title to the land.

Mr. Rauhut:
Unless it is tried here.

Mr. Row:
It wouldn't be the County Court in Gregg County.

Mr. Griffin:
I mean in the District Court.

Mr. Rauhut:
We put the question over here.

Mr. Griffin:
If it is a dispute of title, would it be tried here?

Mr. Rauhut:
This District Court would have jurisdiction to try it. It would be a question of venue and the case was filed without a plea of privilege by the defendants to be sued in Gregg County and that issue is involved in this case in Travis County which is set for trial. Mr. Grffiin, are the assignments whereby Burford seeks to establish title in himself to this strip of record? I haven't seen them and they have not been introduced.

Mr. Griffin:

I believe there is a brief filed in the previous hearing by the attorney showing the ownership in the strip.

Mr. Rauhut:

Have the assignments been filed here?

Mr. Griffin:

That I don't know. The record will have to speak for itself on that.

Mr. Rauhut:

Do you know whether the applicant claims under Mamie Hammonds? I understand that they do. I understand the applicant claims to hold under assignment from Schroeder who in turn had an assignment from Mamie Hammonds on that strip,

Mr. Griffin:

I believe he does have an assignment from Mamie Hammonds and also one from Fuller.

Mr. Rauhut:

The original Fuller lease clearly covered this land. There is no question about that. That lease is in full force and effect and I take it there is no dispute from any source about that.

Mr. Griffin:

Does the Commission have jurisdiction over ownership of land, Mr. Rauhut, to determine it?

Mr. Rauhut:

You have been quoting the law to us.

Mr. Griffin:

I am asking if they have jurisdiction to decide title.

Mr. Rauhut:

I don't think they have jurisdiction to decide title but they should not be granting permits there unless and until Burford establishes title to it. I would like leave at this time to introduce and furnish the Commission with a copy of the chain of assignments from Mamie Hammonds into G. E. Burford. We next desire to offer in evidence—

Mr. Copeland:

Do you claim that he doesn't have title, that Burford doesn't have title?

Mr. Rauhut:

Yes. We claim when we undertook to buy this we undertook to buy all the interest which Mamie Hammonds had.

Mr. Copeland:

Is that stated in the motion for rehearing?

Mr. Rauhut:

We refer to the suit in the first paragraph wherein that question is raised. We say if the strip exists, it is through a subdivision by leasing transactions.

Mr. Copeland:

I believe we don't need to go into that any further.

Mr. Rauhut:

We next desire to offer in evidence in support of the motion for rehearing all the testimony offered by the Sun Oil Company in the prior hearings on the G. E. Burford application to drill these well locations. I believe that is contained in Rule 37 Case 26,868 and there have been two hearings and at one of those hearings—the last hearing incorporated all the evidence adduced at the first

hearing and at the first hearing Sun Oil Company offered in evidence all the testimony offered by it at the hearing on the application of Cecil Cammack to drill wells on this same strip and therefore we consider that to be part of the evidence which we are now reoffering. We contend that if this strip is there as stated it is a subdivision and disregarding that last subdivision and considering the strip as part of the 52.33 acres or the 52.33 acre entire tract, that the drilling of the No. 2 well is not necessary and we contend that the drilling of none of these wells is necessary to protect this entire tract from drainage, and there has been no testimony showing that. But in that connection we desire to ask Mr. Griffin a few questions by way of further cross examination on that point in support of our prayer in the motion for rehearing, in paragraph 4 of that motion.

Mr. Copeland:
I believe we have already gone into that.

Mr. Rauhut:
We think it is undisputed—

Mr. Copeland:
Do you have your own witness present?

Mr. Rauhut:
Yes. We will put him on and show it by him also.

Mr. Copeland:
You have already cross examined Mr. Griffin.

Mr. Rauhut:
I would like to ask a few more questions on it.

Mr Copeland:
We will not go into that. But if you want to put your witness on, that is all right.

Mr. Rauhut:

This is a new point not covered by the record. He introduced a density statement and we propose to show by him that he doesn't consider that density has anything to do with the matter and he so testified before the Commission.

Mr. Copeland:

Did you mention that in your motion for rehearing?

Mr. Rauhut:

We didn't set out all our evidence. But we say that there is no necessity for the drilling of this well at the location granted in order to protect such 52.33 acres and I want to prove that.

Mr. Copeland:

You state that the undisputed evidence shows that already. Why re-hash it?

Mr. Rauhut:

If the first sentence is true and the second one should be considered by the Commission untrue, wouldn't we be entitled to prove that second one? It says when so considered there is no necessity for drilling the well to protect the 52.33 acre tract from the drainage by the adjoining properties. That is what we want to prove.

Mr. Copeland:

Put your own witness on. Mr. Griffin isn't a witness.

Mr. Rauhut:

He is a witness here.

Mr. Copeland:

He hasn't offered himself as a witness.

Mr. Griffin:

They have their own witness here and they have asked for the rehearing to rebut the evidence in the record. Let them put on their own engineer and rebut it.

Mr. Rauhut:

Mr. Griffin says these wells are necessary and I want to examine him under oath on that very point which we have alleged in Paragraph 4.

Mr. Griffin:

Do you have an engineer here?

Mr. Rauhut:

Yes.

Mr. Griffin:

Why don't you prove it by him?

Mr. Rauhut:

I want to prove it by you too.

Mr. Griffin:

I am not offering myself as a witness.

Mr. Rauhut:

Mr. Examiner, I ask that he be sworn and required to testify under the statute which authorizes the Commission to require witnesses to testify.

Mr. Copeland:

We will not require him to testify.

Mr. Rauhut:

Then I desire to offer in evidence the testimony of Mr. Gordon Griffin in the last hearing on the Turnbow application to drill two wells on 2½ acres of the McGrede

tract in the Sanchez Survey, Gregg County, Texas, being the same survey that this land is out of and which testimony was adduced before the Commission and is a part of their records to the effect that density in the opinion of Mr. Gordon Griffin has no more to do with the opportunity of a tract to receive its fair share of the oil than the number of fence posts which go around it. I will mark for the reporter and get the transcript after this hearing and mark for the reporter the exact page which I want to introduce as being his testimony and as being offered by him on that point.

Mr. Griffin:

If he offers that, I want to offer the transcript in every case I have ever testified in before the Commission.

Mr. Rauhut:

If you want to produce them and put them in the record like I am going to do, that is all right.

Mr. Griffin:

I offer them in evidence as the Commission heard each of them, the record of all the evidence I have ever testified to before the Railroad Commission and showing that the individual cases would probably justify—

Mr. Copeland:

I think all that is immaterial.

Mr. Rauhut:

I make that offer. May I mark it and have the reporter copy it here or we will get that transcript now and find it and read it.

Mr. Copeland:

I think it is immaterial to this case unless you can show some connection between the two tracts of land.

Mr. Rauhut:

We feel that we have shown that already by the testimony that we have just offered. And his further testimony in the same record that what a tract has to have to get its fair share of the oil and what it needs is equidistant offsets. The location here involved are not such.

Mr. Copeland:

Can't you prove that by your witness?

Mr. Rauhut:

I can prove it by him. I would prefer to prove it by him.

Mr. Copeland:

His testimony was closed and cross examination of him closed at the former hearing.

Mr. Rauhut:

I am not cross examining him but offering it from the Commission's records—

Mr. Copeland:

Can you show that the conditions in the Turnbow case are the same as in this case and there are the same sand conditions and they are in the same area?

Mr. Rauhut:

They are in the same survey and in the same county.

Mr. Copeland:

If you can't prove that, we will not receive it.

Mr. Rauhut:

They are in the same survey and same County but I am not undertaking to go into detail but merely introducing

the witness' testimony as to what density amounts to in rebuttal of what he has testified to before on density.

Mr. Copeland:
I don't believe it has any bearing on this case.

Mr. Rauhut:
We desire to present the excerpt and have it marked as a bill of exception.

Mr. Copeland:
We don't grant bills of exception here. The record will show what you offered.

Mr. Rauhut:
The record will not show that. I don't want to be arbitrary and ask you for something you shouldn't receive but I want to mark that particular passage.

Mr. Copeland:
You quoted no part of it in the motion for rehearing and the Commission has not agreed to accept anything except what is in the motion for rehearing. If you will confine yourself to what is in the motion, we will proceed.

Mr. Row:
I would like to ask as to the specific meaning of your ruling on Mr. Griffin's testimony. Do I understand that Mr. Griffin not only refuses to testify and not only refuses to answer Mr. Rauhut's question but that you have ruled that it is improper and that you refuse to swear him for that purpose?

Mr. Copeland:
That is correct.

Mr. Row:
That is the correct ruling?

Mr. Copeland:
Yes. That wasn't part of the motion for rehearing and we will not rehash the hearing which we have had before. If you have witnesses and want to put them on to prove something which is in your motion, very good. Confine yourself to the motion. We will go ahead and hear it but we will not consider anything not in the motion for rehearing.

Mr. Rauhut:
That is where the rub comes. I consider that the motion has things in it which you consider aren't in it.

Mr. Copeland:
If you can show it, I will be glad to be shown.

Mr. Rauhut:
As to the No. 2 location in our motion we say that it isn't necessary to prevent waste.

Mr. Copeland:
Then put on your proof to show it.

Mr. Rauhut:
And we show that has been adjudicated in paragraph 2. In paragraph 3 we say it is not now necessary to prevent waste and I would like to cross examine Mr. Griffin in proof of these matters.

Mr. Copeland:
Why use somebody else's witness when you have your own? He hasn't come here as a witness on your motion for rehearing but to cross examine any witness which you brought.

Mr. Rauhut:
He is an expert and has testified before on this matter.

Mr. Copeland:
I can't compel a witness to testify in any case and you can't compel anybody to testify in a case unless you hire them.

Mr. Rauhut:
I understood the Commission had that authority.

Mr. Copeland:
We could if we wanted him to testify for us.

Mr. Rauhut:
The Commission doesn't want to hear what his testimony would be on that any further?

Mr. Copeland:
We want you to prove what you have to prove by whatever means you have available to do it. You can't made Mr. Hudhall or Mr. Griffin or any of them come here before the Commission to testify.

Mr. Rauhut:
We will like to recess for about two minutes.

Mr. Rauhut:
I would like to introduce testimony by Mr. Rhea.

363 MR. A. S. RHEA, having first been duly sworn as a witness, under oath testified as follows:

Questions by Mr. Rauhut:
Q. State your name please.
A. A. S. Rhea.

Q. Where do you live?
A. Tyler, Texas.
Q. What is your occupation or profession?
A. Engineer with the Sun Oil Company.
Q. What kind of engineer?
A. Petroleum engineer.
Q. How long have you been engaged in that profession?

Mr. Griffin:
We will admit his qualifications.

Q. Are you acquainted with the Sun Oil Company's Fuller lease and the Magnolia's Fuller lease and what is called the strip in there?
A. Yes, sir, I am.
Q. Are you familiar with and have you made a study of that area and the producing conditions which exist there?
A. Yes, sir.
Q. How long have you been acquainted with that area?
A. Ever since the leases were drilled, some eight years ago.
Q. It is a bottom hole pressure key well on that Sun lease, isn't there?
A. Yes, sir, there is. The No. 1 well.
Q. No. 1 Fuller?
A. Yes.
Q. Is it part of your position and have you kept up with the pressure conditions there in the reservoir?
A. Yes, sir, I have.
Q. How often are the pressures tested there?
A. They are tested monthly.
Q. When was the last test made, approximately?
A. The latter part of last month, April.

Mr. Copeland:

The Commission took them?

A. The Commission runs the same key well. We run our well with our own instruments too.

Mr. Copeland:

All your wells?

A. The No. 1 well. The Commission uses the same well as a key well. That is Sun Oil Company's W. L. Fuller No. 1.

Q. What is the pressure in that last test and when was it made?

A. The last test was made in the latter part of April and while I haven't figured the formula it is 1060 pounds.

Q. How did that pressure compare with the pressure prior to the first of March?

A. The pressure had shown a decline since the first of March.

Q. On or about the first of March was there a change made in the system of production and proration by the Commission?

A. Yes, there was.

Q. What change was that?

A. Prior to April first the field had been on five days production per week and beginning with April first the one day shut-in was lifted and the field went on 6 days production.

Q. Was that in 1939?

A. Yes.

Q. What was the date of the last test?

A. The latter part of April.

Q. As long as the field was producing at a constant rate and the same number of days per week what was the behavior of the wells in this area according to the tests?

A. The drop was very slight. The pressure was maintained very well, very good, for a period of some 18

months the pressure was the same as at the beginning of the 18 months period.

Q. Wouldn't that indicate in your opinion anything with reference to the permeability and porosity of the sand in this area?

A. Yes, sir, it indicates that the permeability is fairly good and that it reflects the changes produced in the field.

Q. It reflects changes pertaining to the field?

A. Field changes.

Q. As the field pressures vary, the pressure on this well varies in proportion?

A. Yes.

Q. Do you recall what the pressure was in the beginning and at the end of that 18 months period referred to, approximately?

A. As I recall it, it was 1093 pounds at the beginning of the period and 1092 at the end of that period.

Q. Was the proration during that period on a constant level approximately?

A. Very nearly so.

Q. You say that this well pressure has fluctuated in accordance with the fluctuation of the field pressure? I asked you whether or not that indicated anything about the permeability and porosity. Did you give me an answer on that? Does it indicate anything with reference to free connection through the sand?

A. Yes, it does. It indicates that there is a connection. A free connection.

Q. It indicates free connection. Does that indicate good porosity and permeability or bad porosity and permeability?

A. I would say good.

Q. The wells on this Fuller tract—there are more wells than 1 well to 10 acres on this Fuller tract even leaving out these on the strip, aren't there?

A. Yes, sir, there is.

Q. And what is your opinion as to—If you have made any study of it, I will ask you to give me your opinion as to the relative oil content of the Fuller tract now as compared with originally, the amount originally in place under it.

A. There is practically as much oil under the Fuller tract as there was originally.

Q. Approximately how much oil per acre has been produced by the wells on the Fuller tract?

A. Approximately 50000 barrels.

Q. You represent that an exact figure or an approximation?

A. That is an approximation. I don't have the exact figures.

Q. Is there 5000 barrels, 5000 less barrels per acre now under that tract than there was originally?

A. No. There isn't.

Q. Where did that extra oil come from if you have taken out roughly 5000 barrels per acre and yet the content now isn't 5000 barrels per acre less than it was originally? Has oil come in to take the place of that withdrawn?

A. Yes. Oil has migrated to the lease.

Q. Oil has migrated to the Fuller tract?

A. Yes.

Q. From the fact that the production from this Fuller tract has not reduced the original oil content a proportionate amount or an equal amount does that indicate anything as to whether or not wells on the adjoining lands are draining oil from the Fuller tract?

A. It indicates that the wells on the adjoining tracts have not drained oil from the Fuller tract.

Q. In your opinion is there any necessity for drilling any additional wells on the Fuller tract or any part of it in order to prevent drainage to adjoining tracts?

A. There is not.

Q. Does your testimony apply equally to all parts of the Fuller tract? That is, every part has only slightly less than it had originally?

A. That is correct.

Q. I want to ask have you studied in this field and in this area and generally throughout the field the question of trying to get the greatest amount of oil recoverable from the sand?

A. Yes, I have.

Q. Is that a part of your job to determine or study and try to determine what development system or what development pattern will get the greatest recovery of oil?

A. That is correct. Yes.

Q. And whether the drilling of additional wells in particular areas would increase or decrease the ultimate recovery from the area and from the field?

A. Yes, sir.

Q. As to this Fuller tract we will first consider it as a whole 100 acre tract as I believe it is called. This area is now drilled to a greater density than 1 well to 10 acres, isn't it?

A. Yes, it is.

Q. Have you any opinion on the question of whether or not there are enough wells on that tract to produce the recoverable oil in place under it?

A. I think there are enough wells on the tract to produce the oil under the tract.

Q. In your opinion is there any necessity for drilling an additional well or wells between the Sun lease and the Magnolia lease or between the Sun wells and the Magnolia wells in order to efficiently develop and drain the area?

A. I don't think that there is any necessity for drilling there, no, sir.

Q. Do you think that the area between those wells will be efficiently drained of the recoverable oil by the wells there existing?

A. Yes, sir.

Q. If a well is drilled on this strip, a well or wells, and we are treating it as a separate tract for the purpose of this examination, would such wells drain oil from both sides of the strip?

A. It undoubtedly would.

Q. Would it drain oil from that portion of the Fuller tract lying east and west of it?

A. Yes, sir, it would drain oil from the adjacent tracts.

Q. If the strip exists there and is developed as a separate tract, would it be necessary in your opinion in order to lessen the drainage from that well or wells drilled on the strip from the adjacent tracts to drill offset wells on the adjoining tracts?

A. Yes, it would be to protect the interests of the leases.

Q. Each well in this area has the same allowable per day under the Commission's proration order, doesn't it?

A. Under the proration order as set out for the field, each well in the area there has the same allowable with the exception of one well on the tract which has a lesser allowable.

Q. The density or spacing of wells doesn't make any difference in the allowable?

A. No.

Q. The allowable is fixed without reference to that?

A. That is right.

Q. What would be the allowable per acre per day on the strip with one well producing 20 barrels?

A. The allowable per acre per day?

Q. Yes.

A. That is 2.4 acres and it would have an allowable of 20 barrels. The allowable then would be approximately 8 barrels per acre per day.

Q. The Magnolia lease has 50 acres and they have 6 wells?

A. Yes.

Q. What would be the allowable production per acre per day on that tract approximately? About 2-2/5 barrels roughly?

A. Approximately, yes. 120 divided by 50.

Q. Still assuming for the sake of the question that the strip is allowed to be developed as a separate tract and that a strip exists there, then there would be 50 acres over to the west, the Sun Oil Company, with 7 wells?

A. That is correct.

Q. The allowable production per acre per day on that tract would be roughly between 2 and 3 barrels a day?

A. That is right.

Q. The strip would have an allowable production per acre per day of better than three times as great as either of the adjoining tracts in that event?

A. Yes, sir, in the neighborhood of 3 times as great.

Q. Considering the strip as a part of the Sun Oil Company lease, that would be a 52.4 or 52-1/3 acre tract with 7 wells on it. The allowable production per acre per day on that entire area would be a fraction greater than the east 50 acres, wouldn't it?

A. Yes, it would be slightly greater.

Q. You say that the drilling of a well on this strip would force an offset to the east and west in order to lessen drainage from the lands to the east and west. In view of the fact that the producing well on the strip would have an allowable per acre per day roughly 3 times as large as the adjoining area or a little over 3 times as large as the adjoining area, would the drill of an offset well entirely stop drainage from the adjoining tracts by a well on the strip?

A. No, it would not.

Q. The drilling of any well anywhere on this strip would force offsets to the east and west, wouldn't it?

A. That is right.

Q. How wide does the plat attached to the application say, this strip is, Mr. Griffin?

Mr. Griffin:

45 feet, I believe. 22.3 and 22.3 would make 44.6.

Q. If the strip is 45 feet wide and wells are space on it in the center and offset equidistant, they would be about 45 feet from the well on the strip?

A. That is correct.

Q. And there would be 3 wells a total distance of about 90 feet?

A. Yes, that is correct.

Q. What in your opinion would be the effect from the standpoint of the ultimate recovery of oil—from the standpoint of getting the greatest ultimate recovery from the field if you drilled 3 wells in this area on a total of 90 feet apart. Let me ask first what effect would it have on the pressure?

A. Having the number of wells confined and the increased withdrawals from that small area it would create a local low pressure area.

Q. Would it have any effect from the standpoint of causing gas to come out of solution from the oil in this area?

A. It undoubtedly would. Yes.

Q. When the oil starts coming out of solution when the pressure declines in that area. What effect does that have on the recovery?

A. You mean when the gas comes out of solution?

Q. Yes.

A. It will reduce the recovery.

Q. What is your opinion with respect to whether the drilling of wells on the strip taking them alone or in connection with the offsets which you say would be forced as to whether that would increase or lessen the recovery from the field?

A. I believe it would, if anything, lessen the recovery from the field.

Q. Is it your opinion that—what is your opinion with respect to whether that would cause any waste of gas?

A. It would create a wastage of gas, yes.

Q. Is there any bottom water under this tract at this time? Bottom hole water?

A. I don't think so at this time.

Q. How far is it from this tract that you know of, water that you know of?

A. Water is in the neighborhood of 2/3rds of a mile away.

Q. What is your opinion as to whether or not this area—that water will come into this area and in the sand in this area during the producing life over there?

A. It seems to me that it is very likely that water might come in, that water would encroach into the sand before the wells are gone.

Q. Will the drilling of any well on this strip and its offsets—would it or not bring about even or uneven spacing pattern? What does it do?

A. The drilling of additional wells on the tract would bring about uneven spacing?

Q. Yes.

A. Yes, it would.

Q. When you drill offsets, it is more uneven?

A. That is right.

Q. Will that have any importance if and when water comes into the area during its producing life? Will that close and uneven spacing bring about uneven withdrawals of oil?

A. Yes, it will bring about an uneven flooding.

Q. That is when the water comes in. It will bring about an uneven flooding?

A. Yes.

Q. Because of the uneven encroachment of water?

A. Yes.

Q. Is that good or bad from the standpoint of recovering the oil?

A. It is bad in that some of the oil which remains in the sand will be bypassed and left in the sand as unrecovered oil.

Q. That is all.

Questions by Mr. Row:

Q. Mr. Rhea, you have testified that water has already encroached to within about 2/3rds of a mile of this property?

A. Yes.

Q. You have also testified that the recent history of the wells has shown a considerable pressure drop?

A. You mean within—what do you mean by recent?

Q. Within the last month, since the allowable has been increased, since it has been on 6 days production there has been a pressure drop in the area?

A. That is right.

Q. Your conclusion is that if any additional wells are drilled in this area, then the result would be more gas coming out of solution?

A. That is right, and a more rapid pressure drop.

Q. You anticipate that if the pressure is maintained the water will eventually deplete this entire Fuller 100 acres by the water drive; is that correct?

A. Yes.

Q. But if more wells are drilled in the area you anticipate more gas coming out of solution and a partial gas drive as distinct from the water drive?

A. Yes.

Q. What in your opinion is the relation between the gas drive in this field and the water drive in this field so far as it bears upon the amount of oil left in the ground unrecoverable?

A. Well, your water drive is much more or a much greater recovery from the sand than a gas drive.

Q. Would you say the water drive is two times as efficient as the gas drive or 3 times as efficient?

A. I would say at least 2 times as efficient.

Q. If even one more single well is drilled in this area, it will result in waste in the field by leaving larger quantities of oil in place in the field; is that correct?

A. One well, of course, will have an effect on lowering the pressure in the area.

Mr. Copeland:

What do you mean by this area?

Q. On the Fuller lease of 100 acres. In your opinion, Mr. Row, the field rate rather than the spacing of the wells is largely responsible for your ultimate recovery from the field, isn't it?

A. Yes, that is right.

Mr. Copeland:

The rate or the spacing?

Mr. Row:

The rate of flow

Mr. Copeland:

Is more important than the spacing?

A. The rate of withdrawal from the field.

Q. It is far more important than the spacing of the wells?

A. Within reasonable limits of drilling.

Mr. Rauhut:

As part of that answer do you or not take into consideration the typothesys that there will be even withdrawals from the field?

A. With the spacing fairly uniform the withdrawals would be uniform, and that is assuming that the with-

drawals from the field would be fairly uniformly distributed.

Mr. Row:

What is the relation between the pressure in the area around the W. L. Fuller 100 acre tract with the rest of the field?

A. It compares very uniformly with the field. That is, there is such a connection in permeability between the lease and the average of the field that when the field as a whole drops or increases, the same effect is noted in this area.

Mr. Row:

That indicates in your mind no irregular conditions surrounding this particular W. L. Fuller 100 acre tract which would justify any different application of principles to this particular Fuller 100 acres than to any other area of the field?

A. That is right. It is a uniform area, I would say.

Mr. Rauhut:

Do you know what the average pressure in the field is?

A. In the neighborhood of—I would have to use approximate figures—about 1085.

Questions by Mr. Rauhut:

Q. About 25 pounds higher than this pressure on the Fuller tract?

A. Yes, that is right.

Q. The source of pressure in the field is on the west side, isn't it?

A. Yes.

Q. It doesn't come in from the east side?

A. No.

Q. The source of the pressure is on the opposite side of the field, you might say?

A. That is correct.

Q. Is it a natural condition in the field that the pressure be greater on the side where the pressure is coming from than on the center or toward the east side?

A. It is natural that the pressure would be higher on the side from which it is coming. It travels from high to low.

Mr. Copeland:

That isn't true in this case, is it?

A. Yes.

Mr. Copeland:

The pressure on this was 1150?

A. 1060.

Mr. Copeland:

In the middle of the field it was 1085. Then it isn't high on the side where you would expect to find it?

A. Yes. The average of the field is 1085. That is to the west and the pressure is increasing from 1060 in this area.

Mr. Rauhut:

Going west it gets higher?

Mr. Copeland:

I thought this was on the west side.

A. This is on the east side.

Mr. Rauhut:

This is in the Schanze Survey.

A. Of course the 1085 is the average for the field going from low on the east to high on the west.

Questions by Mr. Rauhut Continued:

Q. Now, Mr. Rhea, suppose you had out there extending from the west side of the field over to the east side of the field a section running through there which had exactly the same conditions of porosity and permeability. Would it not be natural on that hypothesis for the pressure to be higher on the west side, the source of pressure than on the east side?

A. Yes, that is right.

Q Do you consider the slight difference in pressure here of 25 or 20 pounds as being—what is that due to? What is that du to? Is it due to position on the structure?

A. It is due to position on the structure, you might say, and that is necessarily a differential which must be set up for the fluid to move from west to east.

Q. Is that a normal difference then? This pressure in this area as compared to the center of the field and the west side?

A. It is normal, yes, in areas of similar location.

Q. There are some areas on the east side of the field where the pressure is very much less than this pressure, isn't there?

A. Yes.

Q. The pressure runs down to some 400 pounds in some areas, doesn't it?

A. Yes.

Q. But in this area you consider that this is a normal pressure indicating normal conditions in the sand compared with the field generally?

A. That and also more uniform spacing.

Q. In other words, the uniformity of pressure, that is, the fact that the pressures here compare favorably with the field average is due to two factors then, similarity of conditions in the sand and the uniformity of spacing which now exists on this Fuller tract?

A. That is right.

Q. Where is the average pressure of the field found relatively? Is it in the center between the east and west sides?

A. Generally speaking, yes.

Q. In your opinion is it important that the pressure on this Fuller tract be maintained as high as possible from the standpoint of getting the highest ultimate recovery of oil?

A. Yes, sir.

Q. And be allowed to decline as little as possible?

A. That is correct.

Mr. Row:

Have any sand lense conditions been found either on the east side of the field or anywhere in the field which have produced oil, indicating that the oil has been pocketed in sand lenses separate from the rest of the reservoir with no connection?

A. I don't know of any.

Mr. Row:

You think if there had been any, you would have known of it?

A. It seems that I would have heard of them.

Mr. Rauhut:

You regard all this productive area as being a common reservoir for the East Texas field?

A. Yes.

Mr. Rauhut:

That is all.

Questions by Mr. Copeland:

Q. Mr. Rhea, do you believe that the closer you space wells the more oil you will get in ultimate recovery? The more ultimate recovery you will get from the field?

A. The closer spacing of wells?

Q. The closer you space the wells the more ultimate recovery you would get from the field. Do you believe in that theory?

A. No, I do not.

Q. Do you believe in the theory of the wider spacing of wells to get more ultimate recovery?

A. I think that you will recover as much oil by wider spacing as by very close spacing.

Q. What spacing would you recommend to get the best ultimate recovery of oil from this field?

A. I don't think that—I would think that spacing 1 well to 10 acres would be sufficiently small.

Q. You think that would get the ultimate recovery?

A. Yes.

Q. And any well drilled less than that would be a useless well and tend to create waste? Would that be right?

Mr. Rauhut:

You mean where any conditions prevail or where conditions like this prevail?

A. Under controlled withdrawals where you are not taking all that you can get I think that is correct. You will recover just as much with rather wide spacing as with close spacing.

Q. But you also think that to space them regularly e n though they are at less distances than 10 acre spacing and taking them ratably you approach that ultimate recovery?

A. Well, I think that you will by having them spaced closer and taking the oil ratably—I don't believe you will recover any more oil from the sand than you will by wider spacing.

Q. I would like for you to look at this map attached to this application on which it has all the wells

drawn with circles around them with 330 foot radius, and see if they are regularly spaced on that lease?

Mr. Rauhut:
Is this on our motion for rehearing?

Mr. Copeland:
You asked about regular spacing of wells and whether it would cause close drilling of wells and I am cross examining him on that same point.

Mr. Rauhut:
Is there 10 acres in each of those circles?

Mr. Copeland:
They each have a 330 foot radius.

Mr. Rauhut:
They don't have 10 acres.

Mr. Copeland:
Mr. Rhea, how would you space wells to have a 10 acre drainage pattern?

A. Spacing 330 feet from the property line is a 10 acre pattern.

Q. That would make 660 feet apart?

A. Yes, that is correct.

Q. If you want to draw those circles larger, I would be glad for you to do that, but these are 330 foot radius. Are those wells evenly spaced?

A. It is about us uniform spacing as you will find in the field. There isn't much uniformity to the spacing anywhere.

Q. Take for example the No. 2 on the strip. Is it any closer to the adjoining wells to it than those other wells shown on that lease? Is it any closer to the adjoining wells than those wells are to each other?

A. I see no wells on the leases which appear to be closer or as close. A little closer, I believe.

Mr. Rauhut:

There are some further apart too, aren't there?

A. Yes.

Mr. Rauhut:

A lot of them further apart?

A. Yes.

Q. And quite a few of them closer?

A. I see two of them which are closer.

Q. All of them are in that same area?

A. Yes.

Q. There is another answer you gave awhile ago I want to ask about. You stated under this Fuller tract there was approximately the same amount of oil in place as when the field started; is that correct?

A. That is my opinion.

Q. Where did that additional oil come from?

A. From the neighboring leases.

Q. Do you know how much ultimate recovery a well spaced on this 2½ acre tract would get from now until the end of the field?

A. How much oil that well would recover?

Q. Yes.

A. It would depend on the life of the well and the rate of production from the well.

Q. Would it recover as much oil from now on during the rest of the remaining life of the Fuller lease has recovered from some other leases already?

A. I didn't follow that question.

Q. Will the Fuller well if drilled recover as much oil from now on during the remaining life of the field as the Fuller lease has recovered from the adjoining leases up to now?

Mr. Rauhut:

I don't believe I understood that question either.

Q. He says it has produced oil for the past 5 or 6 years and has just as much oil under it now as when it started.

A. Slightly less.

Q. Will this well produce as much oil as this Fuller lease has recovered from the adjoining leases already? They have produced several hundred thousand barrels of oil from that lease, haven't they?

Mr. Griffin:

Eight years.

Mr. Rauhut:

Are you testifying, Mr. Griffin?

Mr. Griffin:

No. The witness testified it was 8 years.

A. It is hard to say how much that one well would produce from the adjoining leases.

Q. I didn't ask how much it would produce from the adjoining leases but how much in relation to the amount which the Fuller lease has already produced from the adjoining leases. Do you know how much oil the Fuller lease has produced up to date?

A. We have them available but I don't have them.

Q. It would be in the neighborhood of 200,000 barrels?

A. Something like that.

Q. How much less recoverable oil under that tract is there now than when the field was opened up?

A. Very little less.

Q. Not 200,000 barrels less?

A. No.

Q. Then I want to know would this one well produce during the remaining life of the field as much as that

200,000 barrels of oil if produced in accordance with the rules of the Railroad Commission under the present system of proration?

Mr. Rauhut:
I don't see the materiality of that.

Q. I would still like for him to answer the question. Could it possibly produce under the present proration rate of flow 200,000 barrels of oil?
A. I don't think so.
Q. Then how could you say it would drain the Fuller tract to drill the well?
A. It would produce more oil than is under this particular tract.

Mr. Rauhut:
The 2½ acre tract?
A. Yes.

Mr. Copeland:
How could it drain the Fuller tract if they have already drained 200,000 barrels from some other tracts?

Mr. Rauhut:
If you are making the point that the Fuller tract isn't entitled to the benefit of the past situation out there, we make the point that that is a matter of law.

Mr. Copeland:
I didn' say it wasn't. I am just asking about drainage. You said it would drain and I am trying to see where it would drain from.

Mr. Rauhut:
In other words, where would a well on the strip drain from?

Mr. Copeland:
Yes. You stated it would drain from the Fuller tract.

A. Yes.

Mr. Copeland:
That is all.

Mr. Griffin:
You mean that a well on the strip—

Mr. Rauhut:
We are not submitting our witness to cross examination by the applicant unless the applicant's witness submits to cross examination by us.

Mr. Copeland:
That is satisfactory. Any more witnesses?

Mr. Griffin:
No. You mean the representative of the applicant—you don't submit your witness to cross examination by the representative of the applicant in this hearing?

Mr. Rauhut:
I think that both sides are entitled to cross examination and make the point that we want to cross examine you who are the applicant's witness. We still want to cross examine you and examine you further about the things which you have testified to in connection with this application. I am just making the point and are perfectly willing for you to cross examine our witness if you are willing for us to cross examine you.

Mr. Copeland:
Anything further?

Mr. Griffin:
That is all we have. I would like to have it in the record that the attorney for the Sun Oil Company refuses to permit cross examination by the agent of the applicant.

Mr. Rauhut:
Let the record show the fact that we are offering our witness for cross examination by the applicant's representative as soon as the applicant's witness will let us cross examine him.

Mr. Griffin:
I would like to put in the record that Burford doesn't have a witness available for this hearing and there was no agreement by Burford to have a witness here.

Mr. Rauhut:
You refuse to let us cross examine you?

Mr. Griffin:
I am not a witness.

Mr. Stayton:
Let the record show that the Atlantic Refining Company adopts the evidence and statements made by the representatives of the Sun Oil Company and Magnolia Petroleum Company.

The State of Texas,
County of Travis.
I, Louise Kirtk, an employee of the Oil & Gas Division of the Railroad Commission of Texas, do hereby certify that the above and foregoing is a true and correct transcript of my notes made at the hearing held in Austin, Texas, at 10:00 A. M., May 19th, 1939, to the best of my skill and ability.

Witness My Hand on this the 9th day of June, A. D. 1939.

(Signed) LOUISE KIRK.

Sworn to and Subscribed before me, a Notary Public in and for Travis County, Texas, on this the 9th day of June, A. D. 1939.

(Signed) ROSE MODRALL,
Notary Public in and for
Travis County, Texas.

388 FRANCIS E. HEATH, called as a witness by the plaintiff, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Rauhut:

Q. State your name.

A. Francis E. Heath.

Q. What is your profession?

A. I am a petroleum engineer.

Q. By whom are you employed?

A. The Sun Oil Company.

Q. How long have you been a petroleum engineer?

A. I have been working at it since I was graduated from Pittsburgh University.

Mr. Cale:

We admit his qualifications.

Q. Have you had experience in the East Texas Oil Field?

A. Yes, sir.

Q. For how long?

A. Since oil was found in East Texas.

Q. You have been chief engineer for the Sun Oil Company during that period?

A. I have taken care of the petroleum engineering work.

Q. Have you familiarized yourself with the general geological and physical conditions prevailing in this field?

A. Yes, sir; I have studied them a great deal.

Q. Can you in a few words give a general picture of the field?

The Court:

Don't do that. That has been described to this Court, time after time.

Q. Are you familiar with the areas shown on Plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. Do you have a copy of this map there?

A. Yes, sir.

Q. Have you studied the sand conditions in that area?

A. Yes, sir. We have the west half of the Fuller lease, and the adjoining lease, on which we have studied the development, as well as the drilled area.

Q. Have you studied the reactions of that area to variances in pressure in the field?

A. Yes, sir; we have studied the reservoir reactions.

Q. Does that area on that map, as far as the production extends to the east, is that or not a common reservoir underlain with a blanket sand?

A. It is.

Q. That map shows conditions of May 19, 1939. I wish you would look at the west 50 acres of the Fuller Tract; namely, the part under lease to the Sun Oil Company; and further the 2.33-acres shown as X. Y. Z. Oil Company immediately east of it. Consider that entire 52-1/3 acres as one entire tract. Have you made a study

with respect to whether that 52-1/3 acres, without the Burford locations 1 to 4, was reasonably protected from drainage?

A. Yes, sir; I should say it was; and by that I mean to say that it certainly will recover its recoverable oil with the wells already drilled.

Q. The Burford locations, how far are they from the east line of the 52-1/3 acres?

A. 27 feet from the east line of the 52-1/3 acres.

Q. And approximately the same distance from the west line of the two and a third acres?

A. Slightly closer,—a foot or two closer; about the same to the west line.

Q. Will those locations drain any oil from the Sun Oil Company's lease?

A. Yes, sir. Less oil will be recovered from the Sun Oil Company lease because those wells are drilled.

Q. Does the Sun Oil Company have any wells that would serve as offsets to the Burford location?

A. Direct offset, no. The nearest well on the Sun Oil Company's lease is 281 feet from the west line of this two and a third acre tract, whereas the wells on the Tract are 23 feet from the line.

Q. If the Burford wells are allowed, will it be necessary, in your opinion, to drill any additional wells on adjacent leases by way of off-set?

A. You mean adjacent to the strip, considering it as a lease, or adjacent to the Fuller Tract?

Q. What is your opinion with respect to whether the Sun Oil Company would need offset wells to that strip?

A. Certainly, the Sun Oil Company should have to drill additional wells just to meet the offset.

Q. How about the Magnolia Petroleum Company?

A. The Magnolia meeting well for well would have to drill offset wells.

Q. How about tracts to the north and south of the strip?

A. They would have to meet development on the strip and the offset.

Q. If offsets were drilled, where, in your opinion, would it be necessary for your company to space them?

The Court:

Is it necessary to go into all those details? Why not ask him this question: Has he got any notion as to how much of your oil that these people will drain, so as to get on your jurisdictional question?

Q. Mr. Heath, can you give me some estimate of how much—can you state exactly how much oil?

The Court:

Of course, he can't. Ask him if he has any notion about it.

Q. Have you any notion as to how much oil the Burford Wells will drain from the Sun Oil Company that would otherwise be recovered by the Sun Oil Company's Wells, if these Burford Wells were not allowed?

A. I have some general figures on that, yes, sir.

Q. What sort of figures?

A. I might state this—perhaps I had better not make assumptions. I am only assuming from experience today that this lease will be drowned out with water, which is, I believe, a sound assumption; and with that as a background, I will say that with four wells on the strip, the Sun Oil Company would lose between seventy and one hundred thousand barrels of oil that it might have produced if those wells had not been allowed.

The Court:

And oil is worth about $1.00 a barrel?

A. $1.10.

Q. Are you familiar with what allowable was granted the wells in that area at the time this permit was granted?

A. The May schedule of the Railroad Commission—the wells were granted in June—all the wells capable of making twenty barrels of oil in this area were granted twenty barrels. All wells that could not make twenty barrels were permitted to produce what they could.

Q. No wells received more than twenty barrels?

A. Not in this immediate area.

Q. At this time is that situation with respect to allowables the same as it was in May, 1939?

A. The same schedule is in effect. The potentials have not been changed, so the basis of allowable is the same.

Q. Do you remember what the total allowable granted to the Sun's Fuller Wells were?

The Court:

What bearing can that have on the case?

Mr. Rauhut:

Merely to show that this tract was given some—

The Court:

These oil matters have so many various things about them that we could inquire into them for weeks. Every time I try one of these cases I learn something new; but I can't see that that makes the slightest difference. You put this witness on for the purpose of showing that you were going to suffer drainage if the Railroad Commission allowed these other people to top-rate these wells, you have further shown by the witness that your damages will be in excess of the jurisdictional amount. Now, what else do you want to show?

Q. Mr. Heath, had the Railroad Commission conditioned this permit from Mr. Burford in such a way that he would receive—as to lessen his allowable—give him

2.33 per cent of the allowable granted to the Fuller 100-acre tract—I mean the part under lease to Magnolia and Sun,--would that have allowed the Burford strip to produce in proportion to the adjacent tracts on an acreage basis—that is, the remainder of the Fuller tract?

A. Certainly.

Q. And under that arrangement would Burford have received ultimately the equivalent of the recoverable oil under his tract during its producing life?

A. You mean from then on out?

Q. Yes, sir; if he were allowed to produced merely in proportion—in the same proportion that the remainder of the 100 acres was allowed to produce, would he have been permitted to recover the equivalent of the recoverable oil in place?

A. I expect he would have from then on out. He certainly would have recovered at the same rate.

Q. Would that have lessened the drainage of oil from the Sun lease to the Burford lease?

A. Yes, sir; that would have reduced the amount of oil the Burford wells would have produced.

Q. Would the granting of the Burford wells, or the drilling and operating of them, and the drilling and operating of offset wells, have any effect upon the flowing life of the Sun Oil Company's wells adjacent?

A. It would have some effect on them, certainly.

Q. In which way?

A. The high concentration of wells which would result from drilling the large number of offset wells should materially at some point lower the pressure, which would reduce the flowing life.

Q. Would that in turn in crease the operating expenses to the Sun Oil Company and cause it a loss?

A. We certainly would not make as much money. We would lose money.

The Court:

Anything further, counsel?

Q. Mr. Heath, do you recall the permits granted to Mamie Hammonds and the trials with reference to those suits in the 53rd District Court of Travis County?

A. I recall the trials.

Q. Do you remember two suits to set aside permits to Mamie Hammonds on those strips?

A. Yes, sir.

Q. Were you present on those trials?

A. Yes, sir.

Mr. Hart:

Were there two cases in the 53rd District Court? As I recall, there was only one.

Mr. Rauhut:

There were two cases. I thought they were both in the 53rd.

The Court:

This evidence is absolutely inadmissible anyhow.

Mr. Rauhut:

Under the decision that I can cite I think it is admissible.

The Court:

What difference does it make whether he remembers? The papers in the case are the best evidence.

Mr. Rauhut:

We have the papers here, but we don't have the maps showing the conditions that existed in the ground at the time with reference to wells around there, and I want to ask him about that.

Q. As of those times when the Mamie Hammonds permits were granted, were the reservoir conditions—the sand under this strip and the adjacent tract in any way different from the way it is now?

A. No.

Q. The source of pressure was the same?

A. Yes, sir; it was probably a little higher.

Q. Higher then than now?

A. Yes, sir.

Q. The sand had the same porosity and permeability and other characteristics it has now?

A. Yes, sir.

The Court:

I don't know, but it seems to me so idle to ask all those questions. I went into all of that in two or three other cases here. The Supreme Court has held it is none of my business to talk about the permeability of the sand, and about the reservoir pressure and about rock pressure, and about the thickness of the sand—that those are administrative matters. Now, why bring all of that up and wash it out again here. The Supreme Court has the last say, and they have said it, so what is the use of my trying to do something different? You want to try this case over, just like they tried over the Rowan and Nichols case. You have one point here, but you won't pay any attention to that point. That is whether you have had a fair hearing. I am not interested in the thickness of this sand. I know all about the thickness of the sand in the East Texas field, and about the water drive, and all that sort of thing.

Mr. Rauhut:

All I am trying to develop is my res adjudicata point, which is good under the Texas law, and which the Supreme Court did not rule on in the Rowan and Nichols

case. The Texas cases say that is res adjudicata until there is a change of condition, and I want to show that there is no material change in conditions.

The Court:

I think you are wasting time in talking about the structure of the East Texas field, because I haven't anything to do with the structure of that field any more.

Mr. Robertson:

The District Court of Travis County has rendered a judgment that this particular strip was not about six years ago suffering confiscation of oil, and that a well or two wells on it was not under the conditions existing necessary to prevent waste. It is our contention that when the permits in this case were granted three or four years later, that the conditions were the same and that, therefore, the Railroad Commission could not set aside directly or indirectly the judgment rendered by the District Court of Travis County, on practically the same state of facts; and what we want to show now is that the facts have not changed.

The Court:

You may make your record on that, but I don't think there is anything to the point, because the Commission could take it up again.

Mr. Robertson:

It is our theory that if conditions have not changed the Commission cannot make another order and set aside the judgment of the Court.

The Court:

When was this case tried in Travis County?

Mr. Robertson:

The first one was tried in January, 1935.

The Court:

It is perfectly obvious that there have been changes in that reservoir, because there have been withdrawals there and changes in pressures, and changes in water encroachment; so, what is the use of taking that position? Everybody knows material changes have taken place in that reservoir since 1935. There have been enormous withdrawals of oil there, and we know water has been coming in from the west, and we know that the pressure has changed, and what is the use of taking a position like that? Ask him in a few words, if you want to, and see if he testifies that. Ask him if that reservoir is just the same now as in 1935.

Mr. Rauhut:

He has said the pressure is lower, and I am not contending it is not.

The Court:

Then why waste the Court's time trying to prove anything anything like that?

Mr. Rauhut:

I contend that is an immaterial change.

The Court:

The engineers all seem to think it is very material.

Q. Mr. Heath, in your opinion is there anything in the reservoir, or any change in the reservoir, as between the time of the Hammonds permit and this time which deprived the 52-1/3 acres of the Fuller tract of an opportunity to produce the equivalent of the oil under it, and

deprives it of a chance to be protected from drainage without the drilling of any wells on the strip?

A. We know more about the reservoir in this area, and I can see nothing that has been developed that would indicate that the wells that were drilled on the strip would not recover the oil under it.

Q. I didn't understand.

A. I mean on the Fuller 52-acre tract.

Q. From the standpoint of efficiently recovering the oil under that 52-1/3 acres, is there any difference in the condition there now? I mean are the wells that are there now, not counting the well locations on these strips, as able to efficiently recover the oil under the west 52-1/3 acres of the Fuller Tract now as they were at the time the Hammonds permits were granted?

A. In 1935?

Q. Yes, sir.

A We drilled three additional wells—three or four; and if there was any question about it in 1935, certainly we would better answer the question by having more wells. I think we have drilled too many wells, myself.

Q. What is your opinion with respect to this matter of drilling wells on the strip? Is it less necessary at this time than it was at the time of the Mamie Hammonds permit, for the purpose of either protecting the west 52-1/3 acres from drainage, or for the purpose of efficiently recovering the oil under it?

A. I don't think they are necessary now or then.

Mr. Rauhut:

That is all.

Questions by Mr. Robertson:

Q. You have given certain testimony as to the effect of drilling and the operation of any one or more of the wells on this strip—the effect of the operation of those

wells on the Sun Oil Company to the west. Would your testimony be practically the same as to the effect the operation of those wells will have on the operation of the Magnolia lease to the east?

A. Yes, sir.

Q. And as to the amount of oil that will be lost to the Magnolia Petroleum Company, would your testimony be the same, substantially?

A. I would say reduced somewhat.

Q. By about 50 per cent of that which would be lost by the Sun Oil Company?

A. You would lose a considerable amount. I couldn't say whether it would be 50 per cent, but probably roughly somewhere near that. You would not lose as much as the Sun would lose.

Mr. Robertson:

That is all.

Cross Examination.

Qustions by Mr. Cale:

Q. How long have you been employed by the Sun Oil Company?

A. Fifteen years.

Q. I believe you testified that you are familiar with this area?

A. Yes, sir.

Q. Isn't it a fact that the Sun Oil Company has already with the wells in place on this lease recovered an amount of oil equivalent to the amount of recoverable oil that originally underlay this tract?

The Court:

I don't think that has anything to do with this case.

Mr. Cale:

We take the position that it is necessary for them to show an injury.

The Court:

That is right; but under the capture doctrine they are entitled to get all they can get. If they can get it, they are entitled to get it.

Mr. Cale:

But the Texas Courts have held that the test of confiscation is whether the owner with the wells that he had already had been given a fair opportunity to recover the fair share of the oil under his tract.

The Court:

Yes; but I think they are entitled to recover oil as long as they can get it.

Mr. Cale:

I agree with that; but I don't believe they can say they have been deprived of their property without due process of law when they have already recovered an amount of oil substantially equivalent to the oil that originally underlay that tract.

The Court:

Do you think you are entitled to do anything you want to—

Mr. Cale:

I don't think they have a right to complain of the Railroad Commission's orders that try to give a man a man one well when they have produced eight or nine years, and this man has not produced any oil.

The Court:

That is another question. They come in here and say that you have this little tiny thread of land there that you allowed four wells to be put on, and that is in violation of your own rules, and that it is going to drain their land. Of course, a fellow who has a little piece of land will say, "You are draining my land."

Mr. Cale:

He will say then "They have been draining my land for nine years, and I am trying to get my share."

The Court:

I have been trying to indicate to counsel as we went along in this case that my idea of this matter is that I have not got anything to do with the matter of how the Commission issues these permits, and unless it could be so clearly shown that they are almost actually stealing something from somebody, and that the Court ought to intervene—then I don't know whether the Court still has any right to intervene—but I don't think this question you asked him, helps any.

Mr. Rauhut:

We object to the question.

The Court:

The objection will be sustained.

Mr. Cale:

I would like to say this, that we feel like after they have gotten all of the amount of oil that originally underlay that tract, that is all they were originally entitled to, after they have gotten that, we don't believe they should come here and complain because a man tries to drill an additional well—

The Court:

Oil is a wandering thing, and I drill an oil well and tap a reservoir and draw some oil out, and some more oil comes in from my neighbor's land; and under the Texas law I have a right to take that, and the duty rests upon my neighbor to be diligent and drill wells of his own so as to keep me from getting his oil, and that is the capture doctrine. Now, it may be that I have a 40-acre tract, and I have got so many feet thickness of sand, and so many thousands of barrels of oil there according to the estimates of the engineers, and I get it all out, but the fact is that from my neighbor's land an equal amount of oil comes in, so I have as much as I had to start with. That has been proven time and time again in these cases. I have a right to get that oil, and we used to think that if the Commission or anybody issued an order that kept us from doing it, it was taking our property without due process; so I don't think you have any right to say to these people, "Well, you can't make a complaint here, because you have already gotten all the oil you are entitled to", unless the capture doctrine is entirely gone, and you don't contend it is, do you?

Mr. Cale:

No, sir.

The Court:

Then, I think you are wasting time on that line of inquiry.

Mr. Cale:

Would it be proper to prove that for the purpose of the record?

The Court:

I will let you state it in the record later, but I would rather you would not take the Court's time to do it now.

Q. Mr. Heath, with reference to the 2.33-acre tract, before the Wells 1, 2, 3, and 4 were drilled thereon, there were no wells on the tract, were there?

A. Prior to any development there were no wells on each tract.

Q. That is in 1939, the 2.33-acre tract was clearly suffering drainage from all directions at that time with no wells on it?

A. You mean it was not producing any oil?

Q. I mean the oil was going from the area of high pressure to the area of low pressure.

A. But in all probability here you have compensated drainage to offset that movement.

Q. How could that be?

A. Because oil was moving, and the oil reservoir was chucked full.

Q. Under your theory, every time the reservoir was depleted it was again refilling?

A. Not depleted. The oil removed from the reservoir was simply replaced.

Q. By other oil?

A. That is right.

Q. Then the 2.33-acre tract was being deprived of the right to recover its fair share of the oil, but not having any wells?

Mr. Rauhut:

That is a mixed question of law and fact.

The Court:

The objection will be sustained.

Mr. Kuykendall:

I want to call the Court's attention to the fact that these leases were executed in December, 1930, and February, 1931, and the subdivision rule promulgated by the

Commission, and which has been offered in evidence in this case, was not promulgated until 1934, three years after these leases were executed, and we take the position that the rule could not be made applicable to these leases because the leases were executed three years prior to that time.

The Court:

I will sustain the objection. We will take a 10-minute recess at this time.

(Thereupon a recess was taken by the Court.)

Questions by Mr. Kuykendall:

Q. Mr. Heath, do you know whether or not Well No. 2 on this 2.33-acre tract has been plugged and abandoned?

A. Not to my own personal knowledge. I have not seen the plug in the abandoned well. I believe it might be so, but I don't know.

Q. You don't know whether oil was ever produced from that well or not?

The Court:

Aren't those negative matters that you should prove by your own witness, instead of asking somebody who doesn't know anything about it?

Q. Has the Sun Oil Company ever made any application for additional wells since these permits were granted to Burford?

Mr. Rauhut:

We object to that as irrelevant and immaterial, because we cannot be deprived of our rights to try out the validity of this order.

The Court:
The objection will be sustained.

Mr. Kuykendall:
That is all.

Witness excused.

Mr. Rauhut:
I have a stipulation to make. One is by agreement to offer notice of hearing on the last hearing before the Commission, for the purpose of showing who was notified of that hearing, and for the purpose of showing they merely notified those people who adjoined the 2.33 acres.

The Court:
Has adverse counsel seen it?

Mr. Cale:
We agree it is a copy of that sent out by the Railroad Commission.

The Court:
All right. Give it to the Reporter.

(Thereupon the Notice above referred to was marked for identification as Plaintiff's Exhibit No. 21, and same is herewith set out as foliows:)

Rehearing will be held in the offices of the Rule 37 department of the Oil & Gas Division of the Railroad Commission at 9:30 A. M., May 19, 1939.

Yours very truly,

STANFORD PAYNE,

Chief Deputy Supervisor Oil and Gas Division, Railroad Commission.

mk.

Mr. Rauhut:

I have asked Mr. Kuykendall whether we can stipulate as to all of this, and I think we can cut down on the time required is he is ready to give his answer on that.

Mr. Kuykendall:

There are some of these statements we can agree to, and others we cannot agree to, because I don't know whether they are true or not.

Mr. Rauhut:

The following part of paragraph 15 is, I understand, agreed to: On April 4, 1939, prior to the commencement of any operations on the well locations on the 2.33-acre tract, plaintiff advised G. E. Burford by prepaid telegram that it would file with the Railroad Commission of Texas a motion for rehearing, which was granted by the Railroad Commission's order of March 25, 1939. Said motion for rehearing was thereafter filed within the time permitted by the rules of the Railroad Commission with respect to such matters—

The Court:

Why is it necessary to do that in that particularity? Why couldn't you in one sentence say: "It is agreed that

at all times you contested their right to drill these four wells on this strip of land"?

Mr. Rauhut:
And kept them notified that we were going to keep on fighting.

The Court:
Isn't that all there is to it?

Mr. Rauhut:
I am willing to agree to it.

Mr. Kuykendall:
I don't know whether they proceeded with diligence or not.

The Court:
I don't care about that. They have been telling you all the time they have been opposing your doing it, and they are suing you in Court about it.

Mr. Kuykendall:
Yes, sir; they did.

The Court:
You knew all the time they were opposing it?

Mr. Kuykendall:
Ninety days after the permit was granted.

The Court:
How would you like to word it?

Mr. Kuykendall:
I think that the dates speak for themselves; that they did advise us by telegram.

Q. Do you know when that might be done?

A. No; I don't.

Q. From your familiarity with the sand conditions in that area, do you know whether or not at any time in the future there will be oil that can be produced from this well by a pump?

A. On the Well No. 4?

Q. Yes, sir.

A. I would think there would be. I think it is capable of producing oil if we put it on a pump, which would cost about $2,500.

Q. Nos. 1 and 3 are flowing?

A. Yes, sir.

Mr. Kuykendall:

That is all.

Mr. Rauhut:

No cross examination.

(Witness excused.)

413 GORDON GRIFFIN, called as a witness by defendants, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Kuykendall:

Q. State your name.

A. Gordon Griffin.

Q. And your profession?

A. Petroleum engineer.

Mr. Rauhut:

We waive his general qualifications.

Q. Mr. Griffin, did you appear as a witness in this case before the Railroad Commission?

A. Yes, sir.

Q. Were you formerly connected with the Railroad Commission?

A. Yes, sir.

Q. In what capacity?

A. I was chief engineer.

Q. In that capacity did you have occasion to familiarize yourself with the Texas Oil Field?

A. Yes, sir.

Q. Mr. Griffin, I hand you a map that is marked Plaintiff's Exhibit No. 2, January 31, 1939. What does that map reflect? Did you prepare the map?

A. I did not prepare the map. I drew the red line on the map.

Q. Was that offered in evidence at the time of the hearing before the Commission?

A. Yes, sir.

Mr. Kuykendall:

We desire to offer in evidence the map just identified for the purpose of showing the testimony that was before the Commission regarding the densities of areas surrounding this lease.

(Thereupon the map above referred to was identified and received in evidence as Defendant's Exhibit No. 1, and same is made a part of this record at page....)

Q. What does this map reflect—the red marks you referred to that you placed on the map?

A. It reflects the six times area around the tract of 102 acres, by folding the lease northward, northwestward, westward, southwestward and south. The area to the east, to the northeast, and southeast is dry—in other words, non-productive.

406 PLAINTIFF'S EXHIBIT No. 21.

State of Texas.

Railroad Commission of Texas,
Austin.

May 6, 1939.

Notice of Rehearing.

G. E. Burford,
4436 Fairfax Ave.,
Dallas, Texas.

Magnolia Petroleum Co.,
Dallas, Texas.

Sun Oil Co.,
Dallas, Texas.

The Atlantic Refining Co.,
c o H. C. Renz,
Box 2819,
Dallas, Texas.

Standard Oil Co. of Kansas,
Box 256,
Dallas, Texas.

J. G. Beard,
Duncan, Okla.

C. B. Jeffrey,
Littlefield Bldg.,
Austin, Texas.

H. L. Williford,
Railroad Commission,
Kilgore, Texas.

Gentlemen:

Please accept this as a notice of rehearing covering the application of G. E. Burford for a special permit to drill wells Nos. 1 to 4 inclusive on the W. L. Fuller 2.33 acre tract in the D. Sanchez Survey, Gregg County, Texas.

Location desired is as follows:

No. 1: 330' S. of the N. Line; midway between E. and W. lines.

No. 2: 489' S. of location #1; midway between E. and W. lines.

No. 3: 489' S. of location No. 2; midway between E. and W. lines.

No. 4: 330' N. of the S. line; midway between E. and W. lines.

In Rule 37 case No. 26,868 on March 25, 1939, the Commission granted well No. 2 at a point 819 feet south of the north line and midway between east and west lines and denied wells Nos. 1, 3 and 4. On April 29, 1939, the Commission granted applicant's motion for rehearing on his application for wells Nos. 1, 3, and 4 and also granted the Sun Oil Co.'s Motion for rehearing on well No. 2.

The Court:

Why then load the record with a lot of stuff like that? The fact is that you have known all the time that the Sun Oil Company was opposing your drilling those four wells there?

Mr. Kuykendall:

Yes, sir.

The Court:

And that they have been contesting it, and they have been telling you so, and that they have gone not only into Court but before the Commission and fought it; so why not say that, and not have all this long stipulation with dates and all that sort of thing?

Mr. Kuykendall:

We take the position that this permit was granted June 2 and they are allowed under the Railroad Commission's rules 20 days within which to file a motion for rehearing, and they waited until the last day.

The Court:

Well, what of it?

Mr. Kuykendall:

We say that it was done for the purpose of delaying

The Court:

That does not alter the fact.

Mr. Kuykendall:

I am perfectly willing to agree to that and state it in one sentence as you say.

The Court:
All right; somebody dictate it then. Can you dictate it, Mr. Rauhut?

Mr. Rauhut:
I will try. After the Commission granted the Burford permit for well No. 2, and denied the other wells in March, 1939, the Sun Oil Company notified him that it would file a motion for rehearing, which they did in proper time, and which the Commission granted. They further notified him when he started operations on the well that they would file a suit to set aside that permit, when they found out he had started operations; and then when the Railroad Commission granted the last permit, which is dated June 2, 1939, the Sun Oil Company notified him on June 7, that it would—

The Court:
That is what I was trying to get away from.

Mr. Rauhut:
We notified him we were going to fight him down the line, and within ten days after the Commission overruled our motion for rehearing we filed this suit.

Mr. Kuykendall:
I think those facts are true.

The Court:
Very well.

Mr. Rauhut:
Plaintiff rests.

Mr. Hart:
The defendant Railroad Commission asks judgment on the evidence.

Mr. Kuykendall:
We likewise ask judgment on the evidence.

The Court:
I will hear your testimony, gentlemen.

DEFENDANTS' EVIDENCE.

411 A. O. PHILLIPS, called as a witness by defendants, having been duly sworn, testified as follows:

Direct Examination.

Questions by Mr. Kuykendall:

Q. State you rname.
A. A. O. Phillips.
Q. Where do you live?
A. Dalls.
Q. What is your business?
A. Drilling contractor.
Q. Did you drill these four wells on the 2.33-acre lease involved in this case?
A. Yes, sir.
Q. Are all four of the weils producing?
A. No, sir.
Q. Which ones are not?
A. No. 2 and No. 4, I believe.
Q. Did No. 2 ever produce any oil?
A. No, sir.
Q. What about No. 4?
A. I think the well would produce, but it would have to be pumped.
Q. What are the completion dates on those wells?

A. Well No. 1, June 26, 1939; Well No. 2, April 10, 1939; that was a dry hole; we plugged that well. Well No. 3, July 16, 1939; Well No. 4, July 21, 1939.

Q. After the Railroad Commission had granted the permit to drill this No. 2, you proceeded to drill it for Mr. Burford?

A. Yes, sir.

Q. Are you familiar with the location of the well in the application of Mamie Hammond for a well in this area?

A. No.

Q. When did you contemplate or did you contemplate producing from No. 4—putting a pump in?

Mr. Rauhut:

May I ask a question by way of objection? Is this witness the owner of this lease? You asked him if he contemplates pumping it or producing it.

Mr. Kuykendall:

He operates the lease.

Mr. Rauhut:

We object to that question as irrelevant and immaterial to anything in the case.

The Court:

You alleged they have four wells there draining you. Your engineer testified that they damaged you some $70,000 worth. I think they are entitled to controvert that if they want to. The objection will be overruled.

Q. Mr. Phillips, are you contemplating installing a pump to produce the No. 4?

A. Well, why I have not is that I have been so short in money is all.

The Court:

What county is this in?

A. This is in Gregg County. It is up in the northeast end of Gregg County, and on the very eastern side of the field.

The Court:

It is a long way off the fairway?

A. Yes, sir; there is no oil production beyond the east side of the 102-acre tract.

The Court:

All right.

Questions by Mr. Hart:

Q. Mr. Griffin, I believe you testified that this lease is on the east side of the field. In that portion of the field up to the present time when oil has been withdrawn, has it been replaced by other oil pushing in there from other leases to the west of this area?

A. I think that has been true up to the time of the hearing, but I think from now on out that that will not be true.

Q. Explain your answer; I don't understand it.

A. I think that the pressures and withdrawals now in this area have been such, especially on the Magnolia Tract the wells are going on the pump, and there have been wells put on the pump even since the hearing.

Mr. Rauhut:

The validity of the permit is tested either as of the date that the Commission held the hearing to gather the facts to see whether or not it should grant the permit, or at least not later than the date of the granting of the permit; therefore, this is immaterial.

The Court:

I don't think the Court has anything to do with that. I think it is immaterial.

Q. In your judgment, have there been any changes in conditions in this vicinity since the rendition of the judgment in 1935 by the District Court of Travis County?

Mr. Rauhut:

I object to the question because it is too general. I would like for it to be confined.

The Court:

The objection is overruled.

Mr. Rauhut:

Note our exception.

A. The only thing that I can say relative to that would be that there have been additional wells drilled in that area, and where wells have been drilled they do have an effect upon the reservoir.

Q. Additional wells have been drilled on this 102-acre tract that you know of?

A. I had those dates that they were completed. I believe I am right. There were three on the Sun and at least two on the Magnolia.

Mr. Hart:

That is all.

Cross Examination.

Questions by Mr. Rauhut:

Q. The additional wells that you spoke of were on the Sun Oil Company's and Magnolia leases?

A. Yes, sir.

Q. The west 52-1/2 acres of the Fuller tract, have you made any study to determine whether it was as well-protected from drainage in May, 1939, as it was at the date of the Hammonds' permit; have you made a particular study of that question?

A. Not to determine whether or not they were protected from drainage, because the additional wells that have been drilled have helped prevent that. However, I think—

Q. Just confine it to my question.

A. Well, I don't believe I could answer that question.

The Court:

Anything further?

Q. Was the west 52-1/3 acres of the Fuller Tract as well developed from the standpoint of recovering the oil, and was it in better condition with the wells that it had as of May 19, 1939, to efficiently drain the area, than it was back when the Hammonds' permits were granted in 1934?

A. Unfortunately I do not know about the conditions as they existed; but I will say that the additional wells will cause this lease to be more efficiently drained now by virtue of those wells.

Q. I asked you whether this west 52-1/3 acres at the date of this hearing on May 19, 1939, was in better shape from the standpoint of efficiently recovering the oil under it than it was back at the time the Hammonds' permits were granted?

A. I think that is true.

Q. This map that Mr. Kuykendall showed you and which you identified, from the Commission's file, it shows a six times area of the Fuller 100 acres?

A. Yes, sir.

Q. Or 102-acres. What I asked,—does it show anything with respect to drainage?

A. It shows that the 102-acre tract is underdeveloped at the time of the hearing.

Q. Does it show anything with respect to whether it is being drained? Does density show anything?

A. Density does not have the influence upon drainage as does offset wells. In other words, it has always been my opinion that the farther wells are from the property, the less effect they have upon the drainage from a property.

Q. I asked you the effect of density in my question.

The Court:

Counsel, it is idle to go into that sort of stuff. I have nothing to do with that.

Mr. Rauhut:

The map was offered for some purpose, and I am merely showing the witness does not believe it has any effect. That is all.

Examination by the Court.

Q. This is all a comm n reservoir there, isn't it?

A. It is a common re ervoir. However, the sand conditions—

Q. They vary, of course?

A. They vary tremendously, of course, because they have a dry hole in the middle of it.

Q. And the depletion of pressure in the reservoir is common to the reservoir?

A. No, sir; I will say from now on out—

Q. I know; it will be maintained better in certain places?

A. That is true.

Q. But still it is all a common reservoir?

A. It is a common reservoir—all from the Woodbine sand.

Q. That sand out-crops around Dallas and comes on down there?

A. That is true; but it is not uniform and equal in that area.

The Court:
That is all.

Mr. Kuykendall:
That is all.

(Witness excused.)

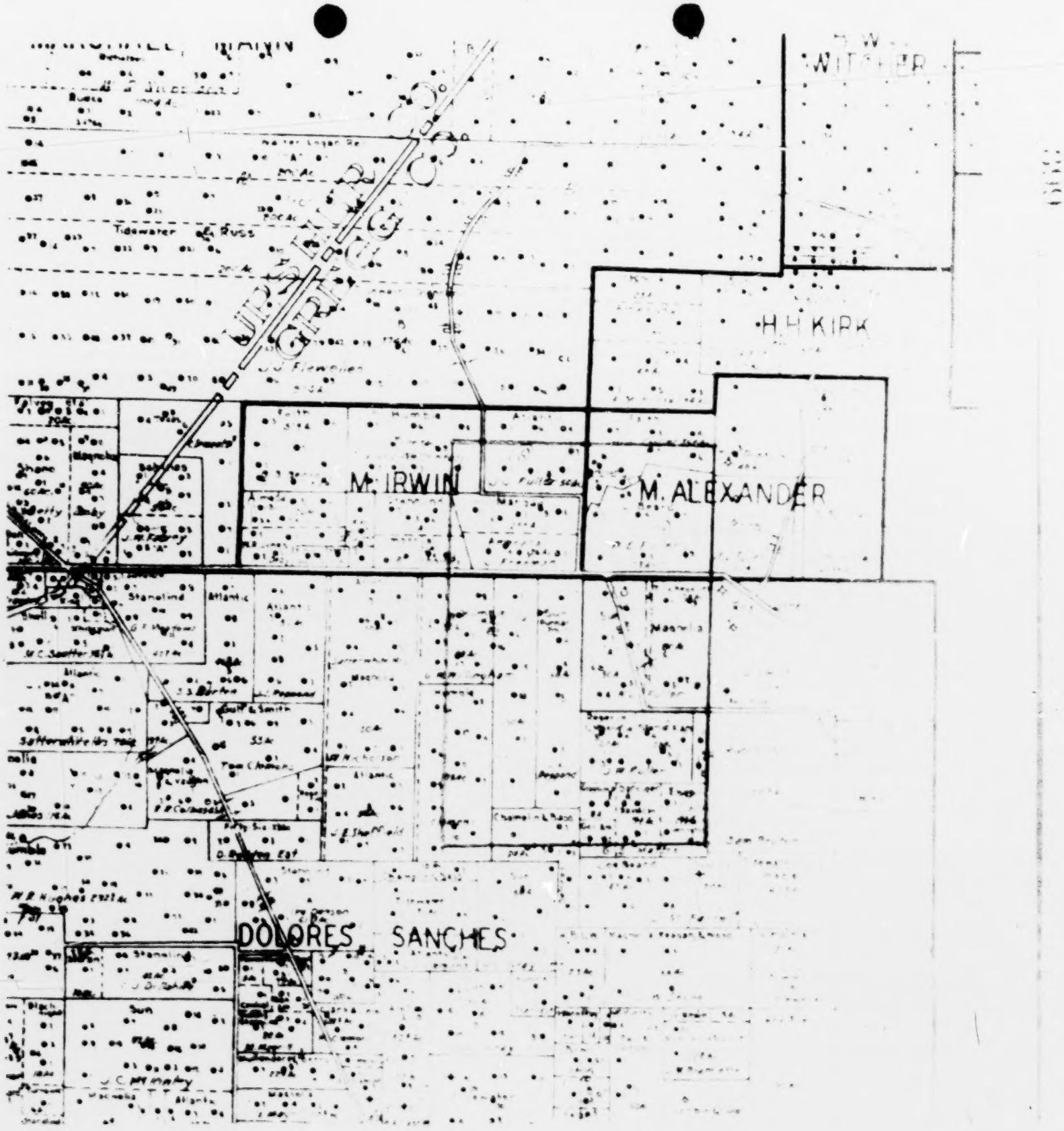
The Court:
Anything further?

Mr. Hart:
Nothing from the Commission.

The Court:
Anything further from the plaintiff?

Mr. Rauhut:
No, sir; we close.

Evidence closed.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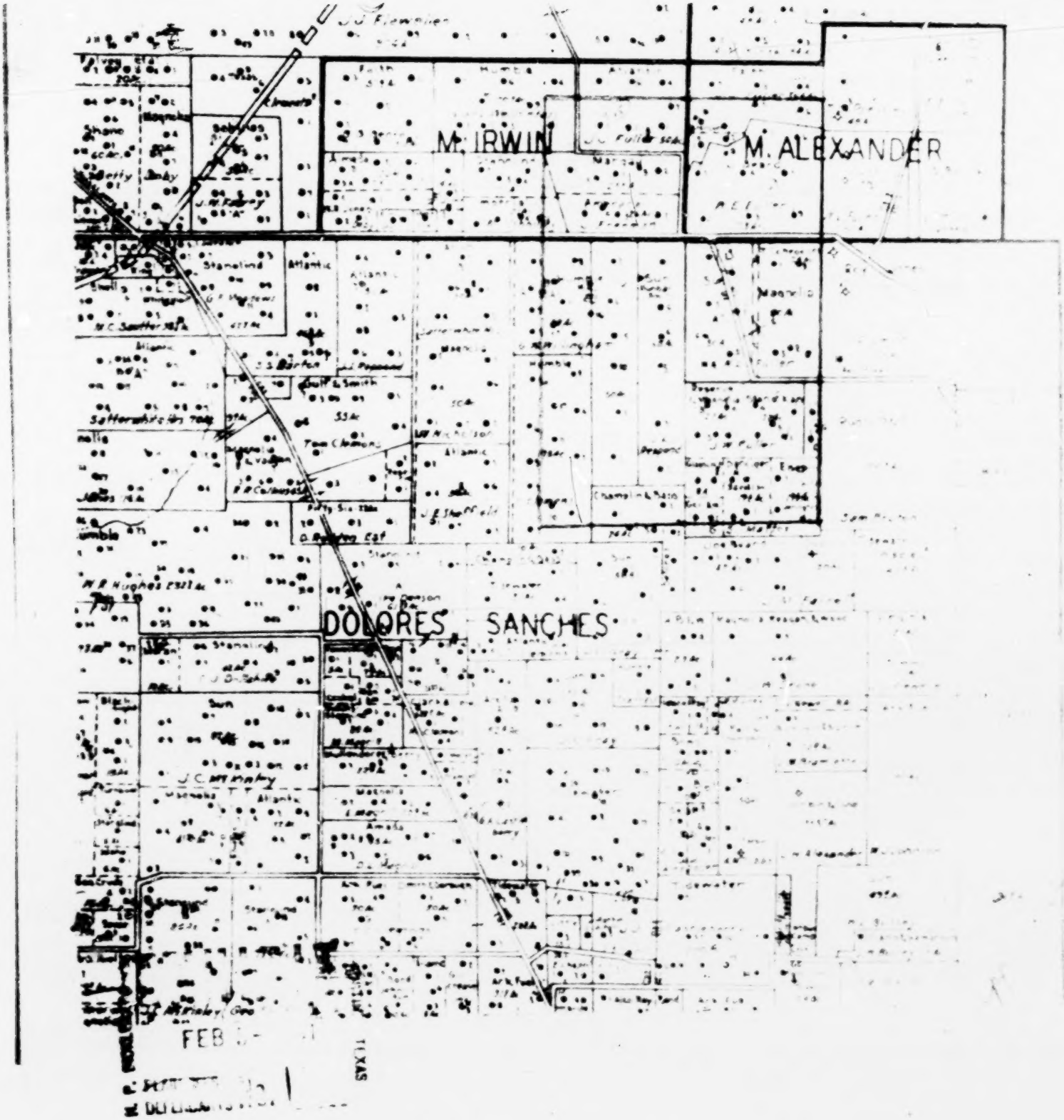
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M. ALEXANDER
DOLORES SANCHES
TEXAS

Transcript of Evidence. Filed 6th day of May, 1941.

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422 NOTICE OF APPEAL.

In the District Court of the United States, Western District of Texas, Austin Division.

Sun Oil Company, Plaintiff,
vs. Civil Action No. 28.
G. E. Burford, et al, Defendants.

Notice is hereby given that Sun Oil Company, plaintiff, and Magnolia Petroleum Company, interventer, hereby appeal to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this cause on February 7, 1941.

(S.) J. A. RAUHUT,
Attorney for Appellant, Sun Oil Company.
(S.) J. B. ROBERTSON,
Attorney for Appellant, Magnolia Petroleum Company.

Address:
Austin, Texas.

Notice of Appeal. Filed 6th day of May, 1941.

APPLICATION OF PLAINTIFF AND INTERVENER FOR ORDER TO SEND UP ORIGINAL EXHIBITS.

423 (Title Omitted.)

To the Honorable Judge of said Court:

Now come Plaintiff Sun Oil Company and intervener Magnolia Petroleum Company, and request that Plaintiff's Exhibit Nos. 1, 5, 5a, 7 and 7a, introduced upon the

trial of this cause, be sent up to the Appellate Court in their original form, and in support thereof show the Court that said exhibits are plats and forms, and if presented in their original form it will aid the Appellate Court in reviewing the case.

Wherefore, Plaintiff and Intervener pray that the Clerk of this Court be instructed to send up, along with the record in this cause, Plaintiff's Exhibits Nos. 1, 5, 5a, 7 and 7a .

(S.) J. A. RAUHUT,
Attorney for Plaintiff.

Address:
Austin, Texas.

(S.) J. B. ROBERTSON,
Attorney for Intervener.

Address:
Austin, Texas.

Receipt of a copy of the foregoing application is hereby acknowledged, and further notice of the filing thereof is hereby waived, this the 24th day of May, 1941, and it is hereby agreed that the foregoing request be granted and that Plaintiff's Exhibits Nos. 1, 5, 5a, 7 and 7a, introduced in this cause, be sent up in their original form.

(S.) F. L. KUYKENDALL,
Attorney for Defendant G. E. Burford.

Address:
Austin, Texas.

(S.) JAMES P. HART,
Attorney for Defendant Rail road Commission of Texas.

Address:
Austin, Texas.

Filed 24th day of May, 1941.

ORDER GRANTING APPLICATION OF PLAINTIFF AND INTERVENER TO SEND UP ORIGINAL EXHIBITS.

425 (Title Omitted.)

On this the 26th day of May, 1941, came on to be considered the application of Plaintiff and Intervener in this cause, wherein they request that Plaintiff's Exhibits Nos. 1, 5, 5a, 7 and 7a, introduced upon the trial of this cause, be sent up to the Appellate Court in their original form; and it appearing to the Court that such request is reasonable and will aid in the understanding of the case by the Appellate Court, it is therefore Ordered, Adjudged and Decreed by the Court that Plaintiff's Exhibits Nos. 1, 5, 5a, 7 and 7a be sent up to the Appellate Court by the Clerk of this Court, and returned to the Clerk of this Court after the disposition of said appeal.

(S.) ROBERT J. McMILLAN,
Judge.

Entered: Min. Vol. 1, page 203.

Filed 26th day of May. 1941.

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426 APPEAL BOND.

(Title Omitted.)

Whereas, in the above styled and numbered cause pending in the United States District Court for the Western District of Texas, Austin Division, and at a regular term of said Court, on February 7, 1941, the Court entered a final judgment dismissing the suit of plaintiff, Sun Oil Company, and intervener, Magnolia Petroleum Company, against the defendants, G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas and the members thereof, E. O. Thompson, G. A. Sadler and Lon A. Smith; and

Whereas, the plaintiff and intervener on the 6th day of May, 1941, filed with the Clerk of said Court a notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

Now, Therefore, we, Sun Oil Company and Magnolia Petroleum Company, principals, and American Surety Company of New York, as surety, acknowledge ourselves firmly bound in the sum of $250.00 to G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas and the members thereof, E. O. Thompson, G. A. Sadler and Lon A. Smith, condition that Sun Oil Company and Magnolia Petroleum Company, appellants, will prosecute their appeal with effect and pay all costs if the appeal is dismissed or the judgment is affirmed, or such costs as the Appellate Court may award if the judgment be modified.

Witness the execution hereof this 6th day of May, A. D. 1941.

SUN OIL COMPANY,
By J. A. RAUHUT,
Its Attorney of Record.
MAGNOLIA PETROLEUM COMPANY,
By J. B. ROBERTSON,
Its Attorney of Record,
Principals.
AMERICAN SURETY COMPANY OF NEW YORK,
By W. T. DECHERD,
Resident Vice-President,
Surety. (Seal)

Attest:
F. T. ANDERSON,
Resident Asst. Secretary.

Authority of Signers for Surety.

Transcript from the Record Book of the Board of Trustees American Surety Company of New York.

"A meeting of the Board of Trustees of American Surety Company of New York was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 21, 1941, at twelve o'clock noon.

* * * * * *

"Upon motion duly made, seconded and unanimously carried, the following Resident Officers were elected, to hold office until their respective successors shall have been duly chosen and shall qualify, or until they shall resign or be removed as provided in the By-Laws:

Place: Austin, Texas.

Resident Vice-Presidents: J. R. Adams, F. T. Anderson, William T. Decherd, W. Jacques, George E. Shelley, E. A. Teague.

Resident Assistant Secretaries: J. R. Adams, F. T. Anderson, William T. Decherd, W. Jacques, T. B. Kellum, S. C. Linscomb, George E. Shelley, E. A. Teague.

* * * * * *

"The following resolution was duly adopted:

"Resolved, That the President, the Vice-Presidents and the Resident Vice-Presidents be, and they hereby are, and each of them is hereby authorized and empowered to execute and deliver any and all surety bonds and under-

takings for or on behalf of this Company, in its business and in accordance with its Charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of the Secretary, an Assistant Secretary, or a Resident Assistant Secretary of this Company."

* * * * * *

State of New York,
County of New York, ss.

I, H. E. Ising, Assistant Secretary of American Surety Company of New York, do hereby certify that the foregoing transcripts from the Record Book of the Board of Trustees of American Surety Company of New York are correct transcripts from said Record Book; I further certify that the foregoing transcript of resolution is a just, true, correct and complete copy of the original thereof.

Given under my hand and the seal of the Company, at New York, N. Y., this May 6, 1941.

H. E. ISING, (Seal)
Assistant Secretary.

Filed 6th day of May, 1941.

STIPULATION OF PARTIES DESIGNATING PARTS OF RECORD, PROCEEDINGS, AND EVIDENCE TO BE INCLUDED IN THE RECORD ON APPEAL.

430 (Title Omitted.)

It is stipulated by the parties to this suit that the following shall be included in the record to go to the Appellate Court:

1. Plaintiff's Amended Complaint;

2. Intervener's Amended Petition in Intervention;

3. Answer of G. E. Burford to Plaintiff's Complaint;

4. Answer of G. E. Burford to Intervener's Petition in Intervention;

5. Answer of Railroad Commission of Texas and its members to Plaintiff's Amended Complaint;

6. Amendment to Answer of Railroad Commission of Texas and its members to Plaintiff's Amended Complaint;

7. Answer of Railroad Commission of Texas and its members to Amended Petition in Intervention;

8. Amendment to Answer of Railroad Commission of Texas and its members to Amended Petition in Intervention;

9. Answer of X. Y. Z. Oil & Gas Company to Plaintiff's Amended Complaint;

10. Answer of X. Y. Z. Oil & Gas Company to Intervener's Amended Petition in Intervention:

11. Judgment;

12. Court's Findings of Fact and Conclusions of Law;

13. Plaintiff's and Intervener's Objections to Findings of Fact and Conclusions of Law and Request for Modification of Same and for Additional Findings;

14. Order Overruling Plaintiff's and Intervener's Objections to Findings of Fact and Conclusions of Law and request for Modification and Additional Findings;

15. Reporter's Transcript of the Evidence and Proceedings;

16. Notice of Appeal, with indorsement showing date of filing;

17. Application of Plaintiff and Intervener that certain exhibits be ordered sent up in original form.

18. Order directing that certain exhibits be sent up in original form;

19. Exhibits ordered sent up in original form;

20. Appeal Bond.

21. This Stipulation of the Parties.

It is further agreed that the foregoing constitute all of the record, proceedings and evidence in this cause except abandoned pleadings and certain other instruments which are recognized by all parties hereto as being immaterial to a full review of every issue in this case, and it is therefore agreed that the filing and serving of a statement of the points to be relied upon on appeal are hereby waived.

Witness our signatures this 14th day of May, 1941.

(S.) J. A. RAUHUT,
Attorney for Plaintiff.

(S.) GREENWOOD, MOODY & ROBERTSON,
J. B. ROBERTSON,
Attorney for Intervener.

(S.) JAMES P. HART,
Attorney for Railroad Commission of Texas and its Members.

(S.) F. L. KUYKENDALL,
Attorney for G. E. Burford and X. Y. Z. Oil & Gas Company.

Filed 14th Day of May, 1941.

432 CLERK'S CERTIFICATE.

The United States of America,
Western District of Texas, ss.

I, MAXEY HART, Clerk of the United States District Court in and for the Western District of Texas, do hereby certify that the foregoing on 431 pages is a true and correct transcript of proceedings had and orders entered, as therein stated, in Cause No. 28 Civil Action, styled Sun Oil Company, et al, versus G. E. Burford, et al, as the same appear on file and of record in this office.

I further certify that said transcript of record embraces only such pleadings, process and orders as are specified in the joint praecipe filed herein by the parties to the suit.

Witness my official signature and the seal of said District Court, at the City of Austin, Texas, this the 9th day of June, A. D. 1941.

MAXEY HART,
(Seal) Clerk of said Court,
By JOE STEINER,
Deputy.

[fol. 409] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 11, 1941

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

On this day this cause was called, and, after argument by J. A. Rauhut, Esq., for appellants, and James P. Hart, Esq., Assistant Attorney General of Texas, and Ed. Roy Simmons, Esq., Assistant Attorney General of Texas, for appellees, was submitted to the Court.

[fol. 410] OPINION OF THE COURT—Filed December 29, 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9962

SUN OIL COMPANY, et al., Appellants,

versus

G. E. BURFORD, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

(December 29, 1941)

Before Holmes and McCord, Circuit Judges, and Dawkins, District Judge

DAWKINS, District Judge:

Sun Oil Company filed its complaint against the Railroad Commission of Texas, G. E. Burford, and X. Y. Z. Oil Company, seeking the cancellation of a permit issued

to Burford for the drilling of four wells upon a tract of 2.33 acres of land in the East Texas oil fields, having dimensions of approximately 49 feet East and West by 2100 feet North and South. In the alternative, it sought to enjoin [fol. 411] the operation of such wells until the Commission, after notice and hearing, should fix the allowable to prevent this small tract from getting more than its full share of the oil in competition with complainant's tract of fifty acres on the West. Magnolia Petroleum Company owning fifty acres adjoining defendant's tract on the East, intervened and joined in the prayer of plaintiff for relief.

Jurisdiction was alleged to exist both because of diversity of citizenship, and the presence of a Federal question.

The petition charged that the Commission has, in effect, disregarded and violated its own rules and regulations in issuing the permit, and that the defendants are taking the oil in such quantities as to drain the lands of complainants and intervenors, resulting in gross discrimination, and the taking of appellants' property in violation of Texas laws and constitution, and the Fourteenth Amendment to the Federal Constitution.

The court below, while maintaining its jurisdiction, decided that it was controlled by the decisions of the United States Supreme Court in the two *Rowan & Nichols Oil Company* cases, 310 U. S. 573, and 311 U. S. 570, which it construed to require in "these conservation cases, the parties should be relegated to the State courts." For this reason, the complaint and intervention were dismissed.

In those cases, jurisdiction was invoked solely upon the ground of a Federal question, since there was no diversity of citizenship. In the first, at page 580 of 310 U. S., the court said that "the only question open to a Federal tribunal is whether the State action complained of has transgressed whatever restrictions the vague contours of the Due Process Clause may place upon the exercising of the State's regulatory power." But upon further consideration, this expression was stricken, and it was said that "the presence of a Federal question may also open [fol. 412] State issues * * *." This was, no doubt, because of the uniformity of past jurisprudence that once a Federal Court takes jurisdiction of a case, it will decide all issues, including those under State law. In the amendment to that opinion (311 U. S. 615), it was said that the

Texas courts had not determined whether "independent judgment" could be exercised by the courts in determining the reasonableness of the Commission's action; nevertheless, it was felt that the State decisions otherwise indicated that the "standard of 'reasonable basis' under the statute opens up the same range of inquiry as the respondent in effect asserted to exist in his claims under the Due Process Clause"; and since it had been found in the original opinion that the showing made in attempting to establish a lack of due process was insufficient, the court would not pursue the matter further "under the guise of enforcing the State statute." That seems to be the reasonable interpretation of what the court meant. The language used was: "What ought not to be done by the Federal courts when the Due Process Clause is invoked, ought not to be attempted by these courts under the guise of enforcing a State statute. In any event, it reversed the lower court's finding of discrimination, violation of the Commission's rules, etc., and reserved the right of complainants there to test the matter in the State courts. Had the decision remained as it was originally handed down, there might be some basis for a distinction in the present case because of the diversity of citizenship, but since that ground was withdrawn, we are forced to conclude, as did the Judge below, that if we find no violation of the Due Process Clause under the Federal Constitution, then we should not attempt to decide the reasonableness of the action of the Railroad Commission.

Ordinarily, where there is diversity of citizenship, and a cause of action exists under State law, the Federal court can and should exercise the same jurisdiction as would a [fol. 413] State court when dealing with the identical circumstances. Both the Federal constitution and the Act of Congress making it effective give citizens of another State the right to resort to the Federal courts and when this is done, those courts usually decide all of the issues involved, whether they be Federal or State. However, in this matter of enforcing the conservation laws of a State with respect to its natural resources, the Supreme Court appears to have set a precedent and made a distinction in which, if not expressly, at least by implication, they have said all issues other than questions under the Federal Constitution

should be relegated to the State court, as was found by the court below.

For more than twenty years, the Railroad Commission of the State of Texas, pursuant to the conservation laws of that State, has conducted investigations and had public hearings in an effort to work out a system for equitably controlling the production of gas and oil in the various fields of that State. After the bringing in of the big East Texas field, special provisions were made to deal with the situation created by its huge production, which, for a time at least, had the effect of demoralizing the oil industry of a good part of the country. These regulations dealt with spacing, quantities to be withdrawn and many other factors, which perhaps would have been unnecessary under normal conditions, but at all times, provision has been made for exceptions to protect what was first termed "vested rights," and later to prevent "confiscation." It was evidently considered that in changing the size of tracts to be drilled, the spacing of wells with respect to each other and from property lines, and restrictions upon the quantity to be allowed from each well, some owners or lessees might be denied the right to produce from their lands at all, under general rules applicable to the field. This resulted from the sizes and dimensions of some tracts with respect to ownership and leases. In such cases, the Commission, after in- [fol. 414] vestigation and notice to the parties interested, attempted to work out a solution that would not be unfair to either the owner of such tracts or adjoining proprietors. There have been many instances where those affected have differed with or questioned the action of the Commission both as to the facts and law or rules and regulations governing these matters. It is but natural that some mistakes would be made, but as pointed out by the Supreme Court in the *Rowan & Nichols* cases, these were matters which a body like the Commission with the assistance of its experts, the use of public hearings at which members of the industry could appear and be heard with suggestions for better regulations was more qualified to work out than a court of justice. In the absence of a clear showing of confiscation or lack of Due Process, such bodies should be left, at least by the Federal courts, to deal with the situation, unless and until the court of last resort of the State has decided that an "independent judgment" as to reasonableness should be exercised by the courts.

There are many elements in the present case, such as the fact that the 2.33 acres involved here was separated or divided from the larger tract before the adoption of special provisions for the East Texas field, in August, 1931; one or more of the wells drilled proved to be a dry hole; the encroachment of water from the Southwest has caused the oil under the lands involved to be replenished after withdrawals, and the complainants have had a head start or nearly ten years in withdrawing oil, undoubtedly including that under the property of defendants. The Commission has found that these and other considerations were sufficient to warrant the exception made in the present case. There is no charge of fraud or wilful abuse of power. The Commission has had at least three hearings upon this particular matter at which the interested parties have appeared and there has been no lack of opportunity for [fol. 415] presenting the contentions of the parties. Whether the State court eventually will hold, as contended by the appellees, that in a judicial review of the Commission's action, the common law rule of substantial evidence applicable to a jury's verdict, shall prevail, of course, remains to be seen. Suffice it to say that we do not find in this case conditions amounting to a denial of Due Process or other violations of the Federal Constitution.

The judgment appealed from is affirmed.

[fol. 416] JUDGMENT

Extract from the Minutes of December 29, 1941

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the

said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered, adjudged and decreed that the appellants, Sun Oil Company, and another, and the surety on the appeal bond herein, American Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fols. 417-422] PETITION FOR REHEARING—Filed January 19, 1942

NO. 9962

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,

Appellants,

vs.

G. E. BURFORD, ET AL.,

Appellees.

APPELLANTS' PETITION FOR REHEARING

TO THE HONORABLE COURT:

Sun Oil Company and Magnolia Petroleum Company, appellants in the above entitled and numbered cause, petition the court to grant a rehearing on the opinion delivered and judgment entered herein on December 29, 1941, and on such rehearing to reverse the judgment of the trial court and render judgment for appellants in accordance with the prayer in appellants' brief, and in the alternative, to reform and correct the judgment of the trial court in such a way as to dismiss without prejudice the questions of State law raised in this case in order that appellants will not be foreclosed, by the unqualified dismissal entered by the trial court and affirmed by this court, from

obtaining an adjudication of such questions of State law in a suit to be hereafter filed for that purpose in the courts of the State of Texas, and as grounds respectively show:

1.

This court, having decided that the issues of State law should be relegated to the State courts for determination, erred in affirming and failing to reform the trial court's general judgment of dismissal, in such a way that it will not be a bar to presentation of the issues of State law to the State courts, in a suit to be filed for such purpose.

2.

The trial court erred in concluding and holding that the various matters of State law raised present no Federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction, and erred in not dismissing the matters of State law without prejudice, if it was not the court's duty to decide such questions; and this court erred in not so holding.

3.

The trial court erred in rendering judgment against appellants, dismissing the action and refusing to cancel the permits and enjoin drilling and operation of the locations involved, because as a matter of law the 2.33 acres was voluntarily subdivided from adjoining lands in such a way that it could not be separately developed in compliance with the spacing rule in existence at the time or any subsequent rule, "to prevent confiscation of property," the sole ground on which it was granted, there being no evidence that the west

52.33 acres of the Fuller tract from which it was subdivided in derogation of the rule needed more wells for such purpose, the application not having been presented or decided on that basis, and notice of hearing not having been given to all who would have been entitled to notice on that basis, and the undisputed evidence having shown that the west 52.33 acres was protected from drainage; and this court erred in not so holding.

4.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits involved and enjoin the drilling and operation of the wells, because as a matter of law the judgment for appellants in Cause No. 54769 (consolidated with No. 54743) is **res adjudicata** of the permits here involved; and this court erred in not so holding.

5.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits and enjoin drilling and operation of the well locations involved, because the pendency of Cause No. 53915 deprived the Railroad Commission of jurisdiction to grant said permits; and this court erred in not so holding.

6.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits and enjoin drilling and operation of the locations involved, because as a matter of law there was no substantial evidence before the Railroad Commission of a necessity for

four locations, or more than one, to be drilled on said 2.33 acres, considered separately, to prevent confiscation of property, and the permits were arbitrarily granted without authority in the State law, and deprived appellants of equal protection of the law and deprive them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and Section 17 of Article I of the Constitution of Texas; and this court erred in not so holding.

7.

The trial court erred in rendering judgment against appellants refusing the alternative relief requested by them for an injunction against the production of oil from the wells in controversy until the Railroad Commission shall, after due notice and hearing, enter an order so adjusting the allowable production from the wells on the 2.33 acres that the total daily allowable from the wells thereon shall not bear a greater proportion to the total daily allowable fixed by the Commission for the wells on the remainder of the Fuller 100 acre tract than the oil reserves in place under the 2.33 acres bear to the oil reserves in place under the remainder of the Fuller 100 acre tract; and this court erred in not so holding.

8.

The trial court erred in its finding of fact No. V, to the effect that the conditions have so changed since the granting of the Hammonds permit for well No. 1 on the strip that the judgment in Cause No. 54769 is not **res adjudicata** of the permits in the case at bar; and this court erred in not so holding.

9.

The trial court erred in concluding and holding that the challenged order of the Railroad Commission does not violate any of the rights of plaintiff or intervener under the Fourteenth Amendment to the Constitution of the United States; and this court erred in not so holding.

WHEREFORE, appellants pray that a rehearing be granted and that upon such rehearing the opinion and judgment of this court dated December 29, 1941, be set aside and judgment be rendered for appellants as prayed for in their brief; but, in the alternative, if this court continues to be of the opinion that it should not decide the questions of State law and that they should be relegated to the State courts for determination, that the judgment of the trial court be modified and corrected by judgment of this court, or under direction of this court, to qualify the dismissal so that it will be without prejudice to an adjudication by the State courts of the questions of State law presented in this case.

Respectfully submitted,

GREENWOOD, MOODY & ROBERTSON
J. B. ROBERTSON
Austin, Texas
Attorneys for Magnolia
Petroleum Company.
T. L. FOSTER
MARTIN A. ROW
Dallas, Texas
POWELL, RAUHUT & GIDEON
J. A. RAUHUT,
Austin, Texas
Attorneys for Sun Oil Company.

I, J. A. Rauhut, an attorney of record for appellant Sun Oil Company in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness my hand, this 16th day of January, 1942.

J. A. RAUHUT.

[fol. 423] ORDER DENYING REHEARING

Extract from the Minutes of February 2, 1942

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 424] APPELLANTS' SECOND PETITION FOR REHEARING AND MOTION FOR LEAVE TO FILE SAME—Filed June 1, 1942

No. 9962

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

SUN OIL COMPANY, et al., Appellants.

vs.

G. E. BURFORD, et al., Appellees

APPELLANTS' SECOND PETITION FOR REHEARING AND MOTION FOR LEAVE TO FILE SAME

To the Honorable Court:

Appellants show that at the present term of this court it rendered its judgment on December 29, 1941, affirming that of the trial court; that, exhibiting the requisite diversity of citizenship, this suit was brought to hold invalid and cancel a well drilling permit and to enjoin operation of wells thereunder, on two separate grounds for relief: (a) as a statutory suit under Section 8, Article 6049c, Ver. Ann. Tex. Civ. Stats.; (b) on the ground that the order violated appellants' rights under the Fourteenth Amendment to the Federal Constitution. This court overruled appellants' contentions with respect to the second ground, but expressly [fol. 425] refused to decide the questions of State law presented in the statutory suit.

Subsequently, on May 13, 1942, in Cause No. 9729, Selby Oil & Gas Co., et al., vs. Railroad Commission, et al., being a similar case wherein there was also diversity of citizenship, this court held that it has the power to decide, and it did decide, the questions of State law therein presented in connection with the statutory suit; and it expressly refused to follow the prior holding in the Burford case, after examining the matter on its merits.

In the light of this action, in the interest of even justice, and in order that appellants will not be denied an adjudication of the questions of State law herein presented and wrongly decided by the trial court, appellants move this court to reconsider their petition for rehearing heretofore timely filed on January 19, 1942, each ground of which is here adopted, and to this end request leave to file this Second Petition for Rehearing.

Wherefore, appellants pray that this Second Petition for Rehearing be filed, that their petition for rehearing be reconsidered, that a rehearing be granted, and that judgment be rendered in accordance with the prayer therein.

Respectfully submitted, Greenwood, Moody & Robertson, J. B. Robertson, Austin, Texas, Attorneys for Magnolia Petroleum Company. T. L. Foster, Martin A. Row, Dallas, Texas; Powell, Rauhut & Gideon, J. A. Rauhut, Austin, Texas, Attorney-for Sun Oil Company.

[fol. 426] I, J. A. Rauhut, an attorney of record for appellant Sun Oil Company in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness my hand, this 26th day of May, 1942.

J. A. Rauhut.

Acknowledgment of Service

Service of the foregoing petition for rehearing and motion is acknowledged, this the 27th day of May, 1942.

(Signed) James P. Hart, Attorney for Appellees G. E. Burford and XYZ Oil & Gas Company. (Signed) Gerald C. Mann, (Signed) E. R. Simmons, Attorneys for Appellees Railroad Commission of Texas and its Members.

[fol. 427] APPELLEES' OPPOSITION TO APPELLANTS' SECOND PETITION AND MOTION FOR LEAVE TO FILE SAME—Filed June 3, 1942

No. 9962

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

SUN OIL COMPANY, et al., Appellants,

v.

G. E. BURFORD, et al., Appellees

Appealed from the District Court of the United States for the Western District of Texas

APPELLEES' OPPOSITION TO APPELLANTS' MOTION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

To the Honorable Circuit Court of Appeals:

Appellees respectfully show that the Appellants' Second Petition for Rehearing should not be filed for the following reasons:

1. The rules of this court do not contemplate the filing of second petitions for rehearing, especially where, as in this case, such petitions merely reiterate contentions already made and overruled. Upon this point, Julge Holmes said in *City of Stuart* v. *Green*, 91 F. (2d) 603, 606:

[fol. 428] "* * * Our rules do not contemplate the filing or consideration of second applications for rehearing. The petition now filed presents nothing that had not been previously considered. Such practice is not to be encouraged. Williams v. Conger, 131 U. S. 390, 9 S. Ct. 793, 33 L. Ed. 201."

2. Even if second petitions for rehearing might be filed and considered under some conditions, the second petition for rehearing in this case is presented too late.

Judgment of affirmance was entered by this court in this case on December 29, 1941. A first petition for rehearing was filed on January 19, 1942, and was overruled on February 2, 1942. The mandate was issued by the Clerk of this court on February 17, 1942, and was received and filed by the Clerk of the District Court on February 19 1942. Noth-

ing further was done by appellants until their Second Petition for Rehearing was served on counsel for appellees on May 27, 1942, and thereafter presented to this court.

(a) Where a petition for rehearing is overruled, a second petition for rehearing should be presented not later than the date on which the rules provide that the mandate of this court shall issue. Rule 32 of this court provides that where an application for rehearing is denied, "the mandate will be stayed for a further period of ten days," and that "no further stay will be granted unless applied for within the delay given above." While the rule further provides that a mandate may be recalled by the court "to prevent injustice," this provision certainly was not intended to cover the situation where there is merely an effort to reopen points already thoroughly presented and considered.

In *Browder v. M'Arthur*, 7 Wheaton, 58, the Supreme Court held that "it was too late to grant a rehearing in a cause after it had been remitted to the court below, to carry into effect the decree of this court, according to its mandate. * * *" Similarly, in *Sibbald v. United States*, 12 Pet. 488, 492, the Supreme Court said:

[fol. 429] "After a mandate, no rehearing will be granted."

See also *Peck* v. *Sanderson*, 18 How. 42.

Since, in the present case, the second petition for rehearing is presented more than three months after the mandate was issued, under the rules stated above, it should not now be filed.

(b) A second petition for rehearing should not be filed and considered after the expiration of the time fixed by statute for applying for review by appeal or certiorari to the Supreme Court of the United States. Under the provisions of Section 350 of Title 28 of the United States Code, three months were allowed to appellants in which they might make application for review of this court's judgment by the Supreme Court. Since the first petition for rehearing was denied on February 2, 1942, the period for making application for appeal or certiorari expired on May 2, 1942. The second petition for a rehearing was presented more than three weeks after the expiration of the three months' period allowed for appeal or certiorari.

The essential ground of the appellants' complaint against this court's decision is their contention that it is based upon a misconstruction of the decision of the Supreme Court in the *Rowan & Nichols* case, 310 U. S. 573. The appellants had a plain remedy to review this court's ruling by applying for appeal or certiorari to the Supreme Court. They did not avail themselves of this remedy, but stood by and let the full three months' time elapse. They have not shown the proper diligence and should not be permitted now to reopen the case.

A plain analogy to the present situation is found in the Rules of Civil Procedure for the United States District Courts. Rule 59(b) provides that ordinarily motions for new trial must be filed within 10 days after the entry of judgment, but that "a motion for new trial on the ground of newly discovered evidence may be made after the expira-[fol. 430] tion of such period *and before the expiration of the time for appeal*, with leave of court obtained on notice and hearing and on a showing of due diligence."

This rule has been construed to mean that after the expiration of the time for appeal, the District Court loses jurisdiction to consider a second motion for new trial. *Abruzzino v. National Union Fire Insurance Co.*, 35 F. Supp. 925.

The same reasoning that warrants the quoted provision of Rule 59(b) in the District Courts would require the conclusion that the Appellants' Second Petition for Rehearing comes too late in this case. There must be some end to litigation. Even where the time for presenting a motion for rehearing may be extended in the discretion of the court, this time should not be extended beyond the extreme limit within which relief may be sought in a higher court.

Interested persons are entitled to assume that litigation is ended when the time for seeking relief in the appellate court has expired without any move being made to obtain such relief.

3. On the merits, appellees believe that this court's judgment is clearly correct. This argument, however, is directed merely to the right of the appellants to file their Second Petition for Rehearing, and we, therefore, refrain from arguing the merits at this time. If Appellants' Second Petition for Rehearing should be entertained by the

court, appellees respectfully request an opportunity to reply fully on the merits.

Respectfully submitted, Gerald C. Mann, Attorney General of Texas; Ed Roy Simmons, Assistant Attorney General, Attorneys for Appellees, Railroad Commission of Texas, et al. F. L. Kuykendall, James P. Hart, Brown Building, Austin, Texas, Attorneys for Appellees, G. E. Burford and X. Y. Z. Oil & Gas Company.

[fol. 431] MEMORANDUM IN SUPPORT OF SECOND PETITION FOR REHEARING AND REPLY TO APPELLEES OPPOSITION—Filed June 8, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 9962

SUN OIL COMPANY, et al., Appellants,

vs.

G. E. BURFORD, et al., Appellees

MEMORANDUM IN SUPPORT OF APPELLANTS' SECOND PETITION FOR REHEARING AND REPLY TO APPELLEES' OPPOSITION THERETO

To the Honorable Court:

1. It is a universally recognized rule of law that "During the term in which a decree is entered, the court entering it may, in the exercise of its discretion, on motion for rehearing or otherwise, change, modify, or set aside its decree." *Obear-Nester Glass Co. vs. Hartford-Empire Co.*, (C. C. A. 8th) 61 F. (2d) 31, 33; *Basset vs. United States*, (1869) 9 Wall. 38, 41, 19 L. Ed. 548; *Henderson vs. Carbondale Co.*, 140 U. S. 25, 11 S. Ct. 691, 696; *Unitype Co. vs. Long*, (C. C. A. 6th) 149 F. 196; *Judson vs. Gage*, (C. C. A. 2nd) 98 F. 540, 543; *Mahler vs. Animarium Co.*, (C. C. A. 8th) 129 F. 897, *Winslow v. Staab*, (C. C. A. 2nd) 242 [fol. 432] F. 426; *Greyerbiehl v. Hughes Elec. Co.*, (C. C. A. 8th) 294 F. 802, cert. den. 44 S. Ct. 402; *I. C. C. vs. L. & N. R. Co.*, (U. S. C. C.) 101 F. 146; *Miocene Ditch Co. vs.*

Moore, (C. C. A. 9th) 150 F. 483. Hence, the second petition for rehearing, filed at the same term and invoking the discretionary power of the court, is not presented too late. In fact, the time limit fixed by the rule for filing of original petitions for rehearing is for the court's protection and may be waived by it. *Burget vs. Robinson*, (C. C. A. 1st) 123 F. 262, headnote 1; *Unitype Co. vs. Long, supra.*

2. For the purpose of modifying, changing, or setting aside its decree, the appellant court may, before the expiration of the term, recall the mandate after it has been issued. Rule 32 of the Court; 5 C. J. S. 1561; *Bank vs. Tennessee*, (1896) 163 U. S. 416; 16 S. Ct. 1113, 1117; *Thomsen vs. Cayser*, (1916) 243 U. S. 66, 37 S. Ct. 353, headnote 1; *Clarke vs. Boysen*, (C. C. A. 8th) 273 F. 923.

Appellees site three very old decisions of the Supreme Court of the United States (*Browder vs. McArthur*, (1822) 7 Wheat. 58; *Sibbald vs. United States*, (1838) 12 Pet. 488; and *Peck vs. Sanderson*, (1855) 18 How. 42) in support of their contention that after the mandate has issued, it is too late to grant a rehearing even at the same term. In the first place, the decisions are not in point, in that each involved motions for rehearing presented at a subsequent term of court. The Sibbald case (12 Pet. 448, 452) recognizes the principle that a court may change its judgment at the *same* term. In the second place, in the subsequent [fol. 433] cases of *Bank vs. Tennessee, supra*, and *Thomsen vs. Cayser, supra*, the Supreme Court itself furnished ample precedent for allowing a rehearing at the same term, even though the mandate had been issued, the procedure being to recall and reform the mandate if a rehearing is granted after issuance of the mandate. In *Burget vs. Robinson*, (C. C. A. 1st) 123 F. 262, 264, the general language in the Browder case quoted by appellees was expressly discussed, and of it the court said:

"Of course, all rules stated so broadly are subject to certain limitations and qualifications. * * * Browder v. McArthur is a notable example of this fact because, in Bank v. Tennessee * * * as the court clearly perceived that it had made an error in its judgment, although the judgment was that of the court, and a mandate had already issued, it was recalled, and the judgment modified."

Appellants, of course, understand that if this court decides to grant a rehearing, it will, in connection therewith

and to prevent injustice, recall the mandate heretofore issued, such being merely ancillary to the accomplishment of the rehearing; and appellants hereby expressly request that such be done.

3. Conceding that second petitions for rehearing are not encouraged, for which reason there is no express rule fixing a time for filing same, second petitions are not unknown but are granted when justice so requires. Appellants' second petition for rehearing should be granted, in that it is based upon the contrary holding of this court in the Selby Oil & Gas Co. case, made at the same term, and subsequent to the filing and overruling of appellants' original petition for rehearing in this cause. Thus, the second petition pre-[fol. 434] sents both a new and an unusual situation, which could not have been raised heretofore, and which is calculated to appeal to the purpose of this court to render even justice, applying the same rule of law to all occupying the same situation.

The situation here is quite analogous to that in *Unitype Co. vs. Long, supra*, in which the court granted a petition for rehearing filed *after* expiration of the period fixed by the court's rule, but *before* expiration of the term, recalled the mandate previously issued, and reversed its original opinion, on the basis of a subsequent decision declaring the law differently from that applied in the original opinion.

The decision cited by appellees construing District Court Rule 59(b) is not applicable here by analogy, in that the Circuit Court has no such rule, and the purposes served by the District Court rule are not apposite here.

Wherefore, appellants pray that a rehearing be granted, that the mandate be recalled, and for judgment in accordance with the prayer in the original petition for rehearing.

Respectfully submitted, Greenwood, Moody & Robertson, J. B. Robertson, Austin, Texas, Attorneys for Magnolia Petroleum Company; T. L. Foster, Martin A. Row, Dallas, Texas, Powell, Rauhut & Gideon, J. A. Rauhut, Austin, Texas, Attorneys for Sun Oil Company.

[fol. 435] Order Granting Leave to File Second Rehearing and Recalling Mandate

Extract from the Minutes of July 6th, 1942

No. 9962

Sun Oil Company, et al.,

versus

G. E. Burford, et al.

It is Ordered that the motion of appellants for leave to file a Second Petition for Rehearing be granted, and that the action of the Clerk of this Court in filing said appellants' Second Petition for Rehearing on June 1st, 1942, be, and the same is hereby, approved.

It is Further Ordered that the mandate of this Court, issued to the Clerk of the United States District Court for the Western District of Texas, at Austin, on February 17th, 1942, be, and the same is hereby, recalled.

[fol. 436] Opinion of the Court on Appellants' Second Petition for Rehearing—Filed July 11, 1942

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 9962

Sun Oil Company, et al., Appellants,

versus

G. E. Burford, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

On Appellants' Second Petition for Rehearing

(July 11, 1942)

Before Holmes and McCord, Circuit Judges, and Dawkins, District Judge

Holmes, Circuit Judge:

Our rules do not contemplate a second petition for rehearing,[1] but this one was allowed to be filed because of an

[1] City of Stuart v. Green, 91 F. (2) 603, 605.

alleged conflict within the circuit of decisions rendered by [fol. 437] this court at this term.[2] Although the mandate in this case has been sent down, there is no reason why it may not be recalled by the court during the same term to prevent injustice.[3]

In opposition to our recalling the mandate and considering a second petition for rehearing, the appellees have cited four decisions of the Supreme Court, some of which contain language indicating that we do not have the power to do so.[4] A careful examination of these cases reveals that in none of them was the effort to have the mandate recalled, or a second petition for rehearing considered, brought up at the same term of the court. This is a vital distinction, because it is the general rule that courts have full control over their orders and judgments during the term at which they were rendered, with certain exceptions, none of which are applicable here. *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 40. Therefore, to avoid injustice to any one from a conflict in our decisions, we have ordered the mandate recalled, and shall proceed to a consideration of the second petition for a rehearing on its merits.

The decision in this case was rendered on December 29, 1941. The case of *Selby Oil & Gas Company v. Railroad Commission of Texas, supra*, was decided by this court on May 13, 1942. In the meantime, the Supreme Court of Texas held that the courts of that state might exercise an independent judgment upon the validity of oil-proration orders of the Railroad Commission of Texas. In these circumstances, in order to make sure that even handed justice will be done in both cases, we have determined to grant a rehearing in this one, and to remand it for retrial in the court that is to retry the *Selby* case. In so doing,

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[2] Sun Oil Co. v. Burford, 124 F. (2) 467; Selby Oil & Gas Co. v. Railroad Commission, — F. (2) —.

[3] Rule 32 of Rules of United States Circuit Court of Appeals for the Fifth Circuit; Thomsen v. Cayser, 243 U. S. 66.

[4] Browder v. M'Arthur, 7 Wheat. 58; United States v. Sibbald, 12 Pet. 488; Peck v. Sanderson, 18 How. 42; Williams v. Conger, 131 U. S. 390.

we deem it necessary to restate the governing law of the case, as follows:

[fol. 438] When a federal court has jurisdiction of a controversy on the ground of diversity of citizenship, it has the power to decide all issues arising therein under the laws of any state in accordance with the statutes and decisions of that state; the same rule obtains where federal jurisdiction attaches solely by reason of a federal question.

In *Railroad Commission of Texas et al. v. Rowan & Nichols*, 310 U. S. 573, 311 U. S. 570, 615 (followed by this court in our opinion reported in 124 F. (2) 467), the Supreme Court did not either abrogate or engraft an exception upon the well-settled doctrine that when a federal court once properly takes equitable jurisdiction of a controversy on any ground it may decide all questions of law and fact necessary for a complete disposition of the case. In denying the motion for a rehearing (311 U. S. 615), the Supreme Court withdrew its first statement announcing a contrary doctrine except where jurisdiction rests upon diversity of citizenship.

The *Rowan & Nichols* decisions, *supra*, are determinative of the federal rule in equity now applicable in suits for injunctive relief against orders of the Texas Railroad Commission so far as attack thereon is based on the "vague contours of the due-process clause" of the Fourteenth Amendment. What was done in those cases, as was pointed out in the dissenting opinions therein,[5] was radically to change the application of equitable principles in suits to enjoin administrative regulations under the conservation laws of a state.

The gist of the law on the subject, as presently understood, is that in promulgating such regulations the State Commission is performing delegated legislative functions, and the federal courts should not substitute their judgment [fol. 439] for that of the Commission with respect to what is wise and fair in the economy of the state. At the same time the federal court, if it has jurisdiction, may enjoin the

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[5] See dissenting opinion of Mr. Justice Roberts, concurred in by Chief Justice Hughes and Mr. Justice McReynolds, citing Thompson v. Consolidated Gas Utilities Corp., 310 U. S. 584.

enforcement of a void order in a suit by any one injuriously affected by it. If the order is not arbitrary, but rests upon a reasonable basis in fact, it is not violative of the Fourteenth Amendment; if valid under said amendment, it may be invalid under local law, in which case the federal court should not decline to strike it down; but, if the local law is doubtful, the federal court should stay its hand until the matter has been decided by the state court.[6]

When the *Rowan & Nichols* cases were decided, the Texas law did not clearly appear from state decisions. Recently, however, in *Railroad Commission, et al. v. Shell Oil Co., Inc., et al.*, decided March 11, 1942, 161 S. W. (2) 1022, the Supreme Court of Texas has spoken with authority upon the subject. We now know the legal requisites of orders and regulations of the Railroad Commission under the conservation laws of Texas. They are governed by the same principles of construction as are generally applied in construing state statutes. They must contain a guide or standard applicable alike to all individuals similarly situated, so that any one interested may determine his own rights or exemptions thereunder. The administrative agency may not exercise an unbridled discretion to enforce them against some and to refuse to enforce them against others. Even though fair on its face, if an order or regulation is administered with an evil eye and an unequal hand, it is invalid.

The Texas Railroad Commission did not exhaust its authority under the conservation laws by adopting the general provisions of Rule 37. It may change that rule [fol. 440] or make exceptions to it, but it may not provide one rule for a specific person or class and a different rule for another person or class, unless there is some reasonable factual basis for making the distinction. A reasonable margin for error of judgment must be allowed the Commission by the courts of Texas. The courts must respect the accepted demarcation between legislative and judicial

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[6] Railroad Commission of Texas, et al. v. Rowan & Nichols, 310 U. S. 573, 311 U. S. 570, 615; Railroad Commission of Texas, et al. v. Pullman Company, et al., 312 U. S. 496.

power,[7] and may not trespass upon the legislative discretion of the Commission in determining the wisdom or reasonableness of any rule, order, or regulation. Whether the Commission heard evidence or not is immaterial; it is not required to take testimony or make findings of fact before promulgating its orders. Such procedure is foreign to the laws of Texas, although customary under federal statutes. If the facts in existence when the order was made, as later shown by evidence before the court, were such that reasonable minds could not have reached the conclusion arrived at by the Commission, or if the agency exceeded its power, then the order should be set aside by any court of competent jurisdiction. To determine the validity of the order, the question is not whether the agency actually heard evidence, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same.

Examining further the opinion of the Supreme Court of Texas in the above case, we find that the standard of reasonableness under the Texas law, set up for the Commission in determining the validity of its orders and regulations, is identical with that ordinarily used in determining the validity of state statutes under the due-process clause of the federal constitution.[8] Thus, one of the cases relied

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[7] See Art. 11, Sec. 1, of the Texas Constitution, dividing the powers of government into the legislative, executive, and judicial, and providing that no person or collection of persons in one department shall exercise any power properly attached to either of the others, except in the instances therein expressly permitted.

[8] "Since the Legislature has seen fit to vest authority to exercise sound judgment and discretion in the particular matter in the administrative agency, courts will not undertake to usurp powers committed to the agency, and to exercise the agency's judgment and discretion for it. For example, in contesting an order of a commissioner's court fixing a tax rate, or an order of a school board concerning management of schools, the court will not put itself in the position of the administrative agency for the purpose of determining whether or not the action was wise. * * *

"* * * In Texas, in all trials contesting the validity of an order, rule, or regulation of an administrative agency, the trial is not for the purpose of determining whether the

[fol. 441] upon by the Supreme Court of Texas is a decision interpreting the Fourteenth Amendment, decided by the United States Supreme Court, *Yick Wo v. Hopkins*, 118 U. S. 356.

This exemplifies the statement of Mr. Justice Frankfurter in *Railroad Commission v. Rowan & Nichols Oil Co.*, 311 U. S. at page 615, that the standard of reasonable basis under the Texas statute opened up the same range of inquiry as was asserted under the due-process clause of the Fourteenth Amendment. Hence the crucial words of the opinion, which are not *dictum* but the very *ratio decidendi* of the case, that what ought not to be done by the federal courts when the due-process clause is invoked ought not to be attempted by them under the guise of enforcing a state statute.[9]

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agency actually heard sufficient evidence to support its orders, but whether at the time such order was entered by the agency there then existed sufficient facts to justify the same. Whether the agency heard sufficient evidence is not material. In fact, the evidence heard by the agency is not per se admissible upon the trial in the district court. Whether it is admissible upon the trial in the district court must depend upon its own merits under the general rules of evidence, and without regard to whether it had theretofore been introduced before the agency. Magnolia Petroleum Co. v. New Process Production Co., 104 S. W. (2d) 1106; Railroad Commission of Texas v. Magnolia Petroleum Co., 109 S. W. (2d) 967; Lone Star Gas Co. v. State of Texas, 137 Tex. 279, 153 S. W. (2d) 681." Railroad Commission, et al. v. Shell Oil Co., Inc., et al., decided March 11, 1942, 161 S. W. (2) 1022.

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[9] "But, in any event, as we read the Texas cases, the standard of 'reasonable basis' under the statute opens up the same range of inquiry as the respondent in effect asserted to exist in his claims under the Due Process Clause. These latter claims we have found untenable. What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and is not foreclosed by

[fol. 442] Mr. Justice Frankfurter was not discussing a question of federal jurisdiction. He was discussing the discretion of a chancellor in a federal equity suit in cases where the court concededly has jurisdiction. The matter of the issuance of the extraordinary writ of injunction is, and historically has always been, one for the exercise of sound discretion.[10] We cannot emphasize too strongly that in none of these oil-proration cases did the Supreme Court refer to the question of federal jurisdiction. In none of them did it hold that the federal court did not have jurisdiction. We go further and say that in none of them did the court hold that federal equitable jurisdiction did not exist. What it did hold was that, although the federal court had jurisdiction and the case was one of an equitable nature, the facts were such that, in the exercise of its equity jurisdiction, the court was bound by equitable principles to deny the petition for the issuance of the extraordinary writ of injunction. Following the above decision, that is what the court below did in this case, at the same time expressly holding that it had jurisdiction.

A federal court does not impugn its jurisdiction when in the exercise thereof it denies a discretionary writ. Especially is this true when a federal court exercises its equity jurisdiction in deciding that there has been no violation by state action of the federal constitution, and there remains a doubtful question of state law depending upon the construction of a state statute that ultimately can only be de-

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the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the federal courts." Railroad Commission of Texas, et al. v. Rowan & Nichols, 311 U. S. 615. Later followed and cited in the second Rowan & Nichols case, 311 U. S. 577.

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[10] "This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers. Compare 37 Stat. 1013; Judicial Code, Sec. 24 (1), as amended, 28 U. S. C., Sec. 41 (1); 47 Stat. 70, 29 U. S. C., Sections 101-15." Railroad Commission of Texas, et al. v. Pullman Company, et al., 312 U. S. 496, 501.

cided authoritatively by the state courts.[11] More espe- [fol. 443] cially is this true when, in these circumstances a federal equity court withholds its discretionary writ because of economic and geological perplexities that arose in a state in attempting to accommodate conflicting private interests in an oil field with due regard to its conservation policies; and still more is this true when a discretion afforded by equity jurisprudence is exercised as a matter of comity so as to avoid friction in state and federal relations under our dual form of state and national governments.

We do not agree that this action contains two suits, a "constitutional suit", under the due-process clause, and a "statutory suit", under the civil statutes of Texas, as stated by this court in the majority opinion of May 13, 1942, *supra*. We have here only one suit. It is of an equitable nature, and is called a civil action under the Federal Rules of Civil Procedure. In it the plaintiff seeks to have the court declare void a regulatory order of a state agency and to enjoin the drilling of any oil well under it. This is the only relief sought. The alleged grounds of its invalidity are that it violates both the local law and the due-process clause of the Fourteenth Amendment. It is elementary that no court should decide a constitutional question unless its decision is necessary to the disposition of the case.

The uncertainty under the Texas decisions as to whether or not the local courts may exercise an independent judgment on what is reasonable under the Texas statute having been removed by the above-mentioned recent decision of the Supreme Court of Texas, we think, upon a retrial of this case, the district court should first determine whether the order is in conformity to the laws and constitution of

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[11] "The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction. There have been as many and as variegated applications of this supple principle as the situations that have brought it into play." Railroad Commission of Texas, et al. v. Pullman Company, et al., 312 U. S. 496, 500.

the state.[12] If not, that ends the matter and renders un- [fol. 444] necessary any determination under the federal constitution. If the order should be held valid under the local law, it would then be the duty of the court to pass upon any federal constitutional question presented, though it is difficult to see how the order could be held reasonable under the local statute and unreasonable under said due-process clause, or *vice versa*, since the standard of reasonableness is the same in each instance.

We have seen that the rule, order, or regulation is presumed to be valid under the law of Texas, and that the regulatory body is not required to hear testimony in support of it. Therefore, the question for the district court in this case is not whether there was substantial evidence before the Commission to support the order, but (1) whether it is in legal form and valid on its face, and, if it is, (2) whether at the time of its promulgation there existed facts that warranted fair and reasonable minds in arriving at the conclusion that the order was proper and necessary to prevent the waste of public resources or confiscation of private property.

We should not overestimate the importance of the rem-

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[12] "If there was no warrant in state law for the Commission's assumption of authority there is an end of the litigation; the constitutional issue does not arise. The law of Texas appears to furnish easy and ample means for determining the Commission's authority. Article 6453 of the Texas Civil Statutes gives a review of such an order in the state courts. Or, if there are difficulties in the way of this procedure of which we have not been apprised, the issue of state law may be settled by appropriate action on the part of the State to enforce obedience to the order. Beal v. Missouri Pacific R. Co., supra; Article 6476, Texas Civil Statutes. In the absence of any showing that these obvious methods for securing a definite ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands. Compare Thompson v. Magnolia Co., 309 U. S. 478." Railroad Commission of Texas, et al. v. Pullman Company, et al., 312 U. S. 496, 501.

edy provided by the state statute [13] for testing the validity of the conservation laws of Texas and the rules, orders, or regulations promulgated thereunder. This statute confers [fol. 445] jurisdiction on the courts of Texas; it does not extend or restrict the jurisdiction of the district courts of the United States. The latter courts are given power to receive jurisdiction only by the Federal constitution; this jurisdiction is conferred solely by the Congress of the United States. A state statute may create rights that the federal courts will enforce or protect; it cannot enlarge or restrict the equitable jurisdiction of the federal courts.[14] This was true of suits in equity even before the federal rules of civil procedure were adopted; and, now that the Conformity Act has been repealed or superseded by the new rules,[15] it is true of all civil actions in the federal courts except as otherwise provided by federal statutes or federal rules of civil procedure.[16] The merging of legal and equi-

[13] Sec. 8, Art. 6049 (c), Vernon's Annotated Texas Civil Statutes, which is referred to by this court in the majority opinion of May 13, 1942, supra, as the basis of a "statutory suit" wherein "jurisdiction rested on diversity of citizenship" in contradistinction to what is called "the constitutional suit" under the due-process clause of the Fourteenth Amendment.

[14] Ex parte McNiel, 80 U. S. 236; Case of Broderick's Will, 88 U. S. 503; Reynolds v. Crawfordsville Bank, 112 U. S. 405, 410; Whitehead v. Shattuck, 138 U. S. 146; Scott v. Neely, 140 U. S. 106; Pusey & Jones Co. v. Hanssenn, 261 U. S. 491, 498; Dobie on Federal Procedure, page 662.

[15] Sibbach v. Wilson & Co., Inc., 312 U. S. 1.

[16] Rule 82 provides: "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein." As to particular remedies provided by state laws, see Rules 4 (d) (2) (7), 64, and 69 of the Federal Rules of Civil Procedure. Cf. Act of June 1, 1874, c. 200, 18 Stat. 50; Sections 722, 915, 919, and 933 of Revised Statutes of United States. In Moore's Federal Practice, Vol. 1, p. 210, it is said: "The Federal Rules of course establish an independent practice and procedure for all actions in the federal courts heretofore denominated legal and equitable, and therefore no state statute affecting practice and procedure will have effect in the federal courts, except in so far as the Rules themselves specifically adopt state statutory law."

table procedure in the new federal rules had no effect upon substantive legal rights, and the courts must still apply equitable principles to equitable rights and legal principles to legal rights.[17]

Section 8 of said statute, however, does illustrate that no purely judicial powers were conferred upon the Texas Railroad Commission by the conservation laws of Texas; and, as construed by the Texas Supreme Court, it shows that the courts of that state may exercise an independent [fol. 446] judgment as to what is reasonable in preventing waste. Said Section 8 also conferred jurisdiction on the Texas courts to construe the conservation statutes of the state which has been done by the highest court of that state in the above case.[18] So far as that decision deals with substantive rights under the statute,[19] it is binding on the federal courts; but it is wholly ineffective to control the discretion of a chancellor exercising federal equitable jurisdiction. In some instances this discretion is absolutely controlled by federal statutes restricting or prohibiting the granting of injunctive relief in specified cases, particularly in labor disputes, against the collection of taxes, and against state rate orders. Under Rule 2 of the Federal Rules of Civil Procedure there is but one civil action in lieu of procedures at law and in equity; substantive rights are not affected. Federal statutes and decisions determine when, under the facts, the extraordinary writ of injunction shall be granted by the federal courts.[20]

The judgment of this court herein, dated December 29, 1941, will be set aside, the judgment appealed from reversed and this cause remanded to the district court for further proceedings not inconsistent with this opinion.

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[17] 48 Stat. 1064; 28 U. S. C. A., Sec. 723 (b) (c); Moore's Federal Practice, Vol. 1, pp. 208-213.

[18] Railroad Commission, et al. v. Shell Oil Co., Inc., et al., decided March 11, 1942, 161 S. W. (2) 1022.

[19] State statutory authority to bring suit may be a substantive right that the Federal courts will enforce if a case involving such right is within their jurisdiction. Broderick's Will, 21 Wall. 503, 22 L. Ed. 599; Richardson v. Green, 61 Fed. 423, Cert. den., 159 U. S. 264; Sawyer v. White, 122 Fed. 223.

[20] 1 Moore's Federal Practice, pp. 202-208.

McCord, Circuit Judge Specially Concurring:

The original opinion in which we affirmed the District Court in this case was handed down on December 29, 1941, and petition for rehearing was denied on February 2, 1942. Since that time the Supreme Court of Texas has clarified [fol. 447] the questions of State law involved here. *Railroad Commission, et al. v. Shell Oil Co., Inc., et al.*, March 11, 1942, 161 S. W. 2d 1022. Moreover in the case of *Selby Oil & Gas Co. v. Railroad Commission*, No. 9729, — F. 2d —, in an opinion by Judge Hutcheson we rendered a decision which is in conflict with the opinion first handed down in this case. I very much doubt that we have the right after the lapse of such a great length of time, after the time allowed for filing petition for a writ of certiorari has expired, to reopen the case and grant a new trial as has been done here. If, however, this motion is timely and legally granted, the two cases can on a new trial be determined in conformity with the decision of the Supreme Court of Texas, and the conflict that now exists in our two opinions may be obliterated.

[fol. 448] Judgment of December 29, 1941, Set Aside, Etc.

Extract from the Minutes of July 11th, 1942

No. 9962

Sun Oil Company, et al.,

versus

G. E. Burford, et al.

It is ordered by the Court that the second petition for rehearing filed by appellants in this cause on June 1st, 1942, be, and the same is hereby, granted;

It is further ordered that the judgment of this Court entered on December 29, 1941, whereby the judgment of the District Court of the United States for the Western District of Texas was affirmed, be, and the same is hereby, set aside;

On further consideration of this cause, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court appealed from be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court rendered on July 11th, 1942.

[fols. 449-453] APPELLEES' PETITION FOR REHEARING—Filed July 29, 1942

No. 9962

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,
Appellants,

v.

G. E. BURFORD, ET AL.,
Appellees.

PETITION FOR REHEARING

To The Honorable Circuit Court of Appeals:

G. E. Burford, X. Y. Z. Oil & Gas Company, the Railroad Commission of Texas, and Ernest O. Thompson, G. A. Sadler, and Olin Culberson, members of the Railroad Commission of Texas, petition the court to grant a rehearing on the opinion delivered and the judgment entered herein on July 11, 1942, and on such rehearing to affirm the judgment of the district court, and, as grounds therefor, respectfully show:

1.

This court erred in holding that it had jurisdiction to grant the appellants' second petition for rehearing, because such petition was filed more than three months after the appellants' first petition for rehearing was overruled and more than three months after the mandate had been issued.

2.

If this court had jurisdiction to grant appellants' second petition for rehearing, it abused its discretion in granting such petition in this case, because such petition was not filed until more than three months after the appellants' first petition for rehearing was overruled and more than three months after the mandate had been issued and in the meantime appellants had not shown the requisite diligence in that they failed to exercise their right to apply to the Supreme Court of the United States for writ of certiorari.

3.

This court erred in holding that the United States District Court is required to exercise an "independent judgment" in determining the validity of the Railroad Commission's order under the state law.

4.

If the district court should have exercised an independent judgment in determining the validity of the Railroad Commission's order under the state law, still the judgment of the district court should be affirmed and not reversed, and this court erred in not so holding, because:

(a) The issue of the reasonableness of the Railroad Commission's order was developed by evidence heard originally in the district court, and not merely by evidence heard by the Railroad Commission. (R. 102-399)

(b) The district court did not refuse to pass on the issues of state law, but expressly held that under the state law the order was valid. (R. 87, 91)

(c) This court has already determined that the order of the Railroad Commission has reasonable support in the evidence, and, therefore, even by the test laid down by this court in its second opinion, the district court was correct in refusing to issue an injunction against the enforcement of the Railroad Commission's order, upon the ground of alleged invalidity of the order under the state law as well as upon the ground of alleged conflict with the Fourteenth Amendment.

(d) This record shows affirmatively that at the time of the promulgation of the Railroad Commission's order there existed facts that warranted fair and reasonable minds in arriving at the conclusion that the order was proper and necessary to prevent confiscation of private property.

(e) No question of the legal form or validity of the order on its face has been raised by the pleadings or evidence in this case, and the order on its face is valid and legal.

(f) The decision of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Company*, 161 S. W. (2d) 1022, does not require a reversal of this case, since the district court in this case heard original evidence and, judged by the tests established by the Supreme Court of Texas, the record in this case shows that the order of the Railroad Commission is valid.

Wherefore, the appellees, G. E. Burford, XYZ Oil & Gas Company, the Railroad Commission of Texas, and Ernest O. Thompson, G. A. Sadler, and Olin Culberson, members of the Railroad Commission of Texas, pray that a rehearing be granted and that upon such rehearing the opinion and judgment of this court dated July 11, 1942, be set aside and

judgment be rendered affirming the judgment of the district court.

Respectfully submitted,

GERALD C. MANN,
Attorney General of Texas
ED ROY SIMMONS,
Assistant Attorney General
Austin, Texas
Attorneys for the Railroad Commission of Texas and Its Members

F. L. KUYKENDALL,
JAMES P. HART,
Austin, Texas
Attorneys for G. E. Burford and X. Y. Z. Oil & Gas Co.

CERTIFICATE OF COUNSEL

I, James P. Hart, an attorney of record for appellees G. E. Burford and X. Y. Z. Oil & Gas Company in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness my hand, this ..... day of July, 1942.

.....

SUPPORTING ARGUMENT

I. *The appellants' second petition for rehearing was filed too late and should not have been entertained or granted by this court.*

We respectfully urge that this court could not have realized fully the implications and consequences of its action in entertaining and granting a second petition for rehearing in this case. The effect of this court's holding is that no judgment of this court can ever be considered final until the term in which the judgment was rendered has expired. Although the rules do not state the length of the terms of court, we gather from the court's opinion that each term of court lasts for one year. This means that a judgment cannot be considered final—even if a petition for rehearing has been filed and overruled, even if the mandate has been issued, and even if the time for obtaining relief in the Supreme Court has expired—until the term of court has ended.

In this case more than three months had expired after the first petition for rehearing was overruled and the mandate issued, before the second petition for rehearing was filed, but it might as well have been ten or eleven months. The paralyzing effect of this holding on property rights is evident. Even though a party has been completely successful in the district court and in this court (as the appellees were in this case)—even though a petition for rehearing has been overruled—even though the man-

[fols. 454-466] MOTION OF REPUBLIC NATIONAL BANK OF DALLAS FOR LEAVE TO FILE PETITION IN INTERVENTION IN THE NATURE OF A PETITION FOR REHEARING AND PETITION IN INTERVENTION—Filed August 1st, 1942

No. 9962

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,
Appellants

v.

G. E. BURFORD, ET AL.,
Appellees

MOTION OF REPUBLIC NATIONAL BANK OF DALLAS FOR LEAVE TO FILE PETITION IN INTERVENTION IN THE NATURE OF A PETITION FOR REHEARING

To The Honorable Circuit Court of Appeals:

Comes now Republic National Bank of Dallas (hereinafter called petitioner) and files this its motion for leave to file its petition in intervention in the nature of a petition for rehearing and respectfully shows the court:

I.

The petitioner is a national banking association, organized and existing under the Acts of the Congress of the United States of America and having its domicile and place of business in the City of Dallas, Dallas County, Texas.

II.

As appears from the records of this court and the District Court in this case, on February 2, 1942, this court overruled the appellants' first petition for rehearing and on February 17, 1942, this court's mandate was issued and was filed in the District Court on February 19, 1942.

III.

Thereafter, on February 27, 1942, the petitioner, relying on what the petitioner believed to be the finality of this court's judgment, made a loan to A. O. Phillips, of Dallas, Dallas County, Texas, of the sum of $90,000.00. Said loan is payable in accordance with the terms and provisions of a promissory note in the principal amount of $90,000.00, dated February 27, 1942, signed by A. O. Phillips, payable to the petitioner in 35 monthly installments of $1,500.00 each, beginning on March 20, 1942, and thereafter on the 20th of each succeeding month until such 35 installments have been paid, and the balance of un-

paid principal and interest to be paid on the 20th day of the next succeeding month. Said A. O. Phillips is the owner of an oil payment interest, in the original principal sum of $42,000.00, payable out of 5/8 and 7/8 of the production of oil and gas from the land and the oil wells in controversy in this case, by conveyances from the appellee G. E. Burford. The said note for $90,000.00 is secured by a deed of trust executed by the said A. O. Phillips, dated February 27, 1942, conveying to R. J. MacBean, Trustee, certain property, including the oil payment interest of the said A. O. Phillips in the said property involved in this case. On February 27, 1942, the unpaid balance of the said oil payment was approximately $31,000.00, and $30,000.00 of said $90,000.00 loan was allocated by the petitioner to the said oil payment interest of the said A. O. Phillips.

IV.

The petitioner is now the owner and holder of the said note executed by the said A. O. Phillips, the unpaid balance of principal and interest on said note being the sum of $84,931.09. The unpaid balance of said oil payment interest is $27,499.39, and the said oil payment interest of the said A. O. Phillips is now part of the security for the repayment of said loan.

V.

By reason of the facts hereinbefore stated, the pe-

titioner has a substantial interest in the outcome of the present suit and the said interest is similar to the interests of the appellees (other than the Railroad Commission of Texas and its members) and such interest is not in conflict with the interests of any of the appellees. The consent of all of the appellees to the filing of said petition in intervention by the petitioner has been obtained.

VI.

In making said loan and in accepting said security therefor, petitioner relied upon what it in good faith believed to be the final action of this court in overruling the appellants' first petition for rehearing. The appellants did not prosecute an appeal or apply for a writ of certiorari to the Supreme Court of the United States in this case. The action of this court in granting the appellants' second petition for rehearing, which was filed more than three months after the order overruling the appellants' first petition for rehearing, seriously and injuriously affects the petitioner's property rights acquired in reliance upon this court's judgment, in that the value of a large part of the security taken by the petitioner for said loan is impaired and its value is rendered problematical and speculative. In order to prevent injustice to the petitioner, the judgment entered by this court on July 11, 1942, should be set aside and the judgment entered on December 29, 1941, should be reinstated, for the reasons set out in the attached petition in intervention in the nature of a petition for rehearing.

VII.

Wherefore, the petitioner, Republic National Bank of Dallas, respectfully prays that leave be granted to file the attached petition in intervention in the nature of a petition for rehearing, and for such other and further relief as shall be just and proper.

.....

Dallas, Texas
Attorney for Republic
National Bank of Dallas.

THE STATE OF TEXAS
COUNTY OF DALLAS

Before me, the undersigned authority, on this day personally appeared ....., known to me, who, being by me duly sworn, upon his oath says that he is Vice-President of the petitioner, Republic National Bank of Dallas, that he is duly authorized to make this affidavit for the said petitioner, that he has read the foregoing motion, and that the facts therein stated are true.

.....

Subscribed and sworn to before me, this ..... day of July, 1942.

.....

Notary Public, Dallas, County,
Texas.

No. 9962

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,
Appellants

v.

G. E. BURFORD, ET AL.,
Appellees

PETITION IN INTERVENTION OF REPUBLIC NATIONAL BANK OF DALLAS IN THE NATURE OF A PETITION FOR REHEARING

To The Honorable Circuit Court of Appeals:

Comes now Republic National Bank of Dallas (hereinafter called petitioner) and by leave of court files its petition in intervention, praying that the court grant a rehearing on the opinion delivered and the judgment entered herein on July 11, 1942, and

on such rehearing to affirm the judgment of the district court, and respectfully shows:

I.

The petitioner is a national banking association, organized and existing under the Acts of the Congress of the United States of America, and having its domicile and place of business in the City of Dallas, Dallas County, Texas.

II.

The petitioner has an interest in the outcome of this case and in the action of the court in granting appellants' second petition for rehearing, because, after the judgment of this court was entered on December 29, 1941, and after this court overruled the appellants' first petition for rehearing on February 2, 1942, the petitioner, on February 27, 1942, loaned to A. O. Phillips the sum of $90,000.00, upon a promissory note executed by the said Phillips, secured in part by a deed of trust lien upon the oil payment interest of the said A. O. Phillips in the property and the oil wells involved in this suit. The petitioner is the owner and holder of said note and the said lien securing the same. There is an unpaid balance of $84,931.09 on said note and an unpaid balance of $27,499.39 on said oil payment.

III.

The judgment of this court affirming the judgment of the district court was entered on December 29, 1941. The appellants' petition for rehearing was filed on January 17, 1942, and was overruled on February 2, 1942. The mandate of this court was issued on February 17, 1942, and was filed in the district court on February 19, 1942. The appellants' second petition for rehearing was not filed until May 27, 1942, and the judgment granting said second petition for rehearing and reversing the judgment of the district court was entered on July 11, 1942.

IV.

A rehearing should be granted on the opinion delivered and the judgment entered on July 11, 1942, and on such rehearing this court should affirm the judgment of the district court, on the following grounds:

(1) This court erred in holding that it had jurisdiction to grant the appellants' second petition for rehearing, because such petition for rehearing was filed more than three months after the appellants' first petition for rehearing was overruled and more than three months after the mandate had been issued.

(2) If this court had jurisdiction to grant appellants' second petition for rehearing, it abused its

discretion in granting such petition in this case, because such petition was not filed until more than three months after the appellants' first petition for rehearing was overruled and more than three months after the mandate had been issued, and in the meantime appellants had not shown the requisite diligence in that they failed to exercise their right to apply to the Supreme Court of the United States for writ of certiorari, but treated the judgment of this court as final, and permitted valuable property rights to be acquired by this petitioner in reliance upon this court's first judgment.

(3) This court erred in holding that the United States District Court is required to exercise an "independent judgment" in determining the validity of the Railroad Commission's order under the state law.

(4) If the district court should have exercised an independent judgment in determining the validity of the Railroad Commission's order under the state law, still the judgment of the district court should have been affirmed and not reversed, and this court erred in not so holding, because:

(a) The issue of the reasonableness of the Railroad Commission's order was developed by evidence heard originally in the district court, and not merely by evidence heard by the Railroad Commission.

(b) The district court did not refuse to pass on the issues of the state law, but expressly held that under the state law the order was valid.

(c) This court has already determined that the order of the Railroad Commission has reasonable support in the evidence, and, therefore, even by the tests laid down by this court in its second opinion, the district court was correct in refusing to issue an injunction against the enforcement of the Railroad Commission's order upon the ground of alleged invalidity of the order under the state law as well as upon the ground of alleged conflict with the Fourteenth Amendment.

(d) This record shows affirmatively that at the time of the promulgation of the Railroad Commission's order there existed facts that warranted fair and reasonable minds in arriving at the conclusion that the order was proper and necessary to prevent confiscation of private property.

(e) No question of the legal form or validity of the order on its face has been raised by the pleadings or evidence in this case, and the order on its face is valid and legal.

(f) The decision of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Company*, 161 S. W. (2d) 1022, does not require a reversal of this case, since the district court in this case heard original evidence and, based on the tests established by the Supreme Court of Texas, the record in this case shows that the order of the Railroad Commission is valid.

WHEREFORE, Republic National Bank of Dallas

respectfully prays that a rehearing be granted and that upon such rehearing the court set aside its judgment of July 11, 1942, and reinstate its judgment of December 29, 1941, that the judgment of the district court be affirmed, and for such other and further relief as shall be proper in the premises.

.....

Dallas, Texas
Attorney for Republic
National Bank of Dallas.

CERTIFICATE OF COUNSEL

I, LANHAM CROLEY, attorney of record for intervener Republic National Bank of Dallas in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness my hand, this ..... day of July, 1942.

.....

THE STATE OF TEXAS
COUNTY OF DALLAS

Before me, the undersigned authority, on this day personally appeared .....,
known to me, who, being by me duly sworn, upon his oath says that he is Vice-President of the petitioner,

Republic National Bank of Dallas, that he is duly authorized to make this affidavit for the said petitioner, that he has read the foregoing petition, and that the facts therein stated are true.

.....

Subscribed and sworn to before me, this ..... day of July, 1942.

.....

Notary Public, Dallas County, Texas.

CONSENT TO FILING OF PETITION IN INTERVENTION

Consent to the filing of the foregoing petition in intervention of Republic National Bank of Dallas

is given, this ..... day of July, 1942.

.....

Assistant Attorney General
Attorney for Railroad Commission of Texas and its Members.

.....

Attorney for G. E. Burford and X. Y. Z. Oil & Gas Company.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing motion for leave to file the petition in intervention, and of the petition in intervention in the nature of rehearing, of Republic National Bank of Dallas, is acknowledged, this ..... day of July, 1942.

.....
Attorney for Sun Oil Company

.....
Attorney for Magnolia
Petroleum Company

[fols. 437-472] APPELLANTS' THIRD PETITION FOR REHEARING—Filed August 1, 1942

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT

NO. 9962

SUN OIL COMPANY, ET AL.,

Appellants,

vs.

G. E. BURFORD, ET AL.,

Appellees.

APPELLANTS' THIRD PETITION FOR REHEARING

TO THE HONORABLE COURT:

Sun Oil Company and Magnolia Petroleum Company, appellants in the above entitled and numbered cause, petition the court to grant a rehearing on the opinion delivered and judgment entered herein on July 11, 1942, and on such rehearing to let stand that part of judgment which reverses the trial court's judgment but set aside that part of the judgment which remands the cause to the trial court, and to render

judgment for appellants in accordance with the prayer in appellants' brief, and as grounds respectfully show:

1.

The trial court erred in rendering judgment against appellants, dismissing the action and refusing to cancel the permits and enjoin drilling and operation of the locations involved, because on the undisputed evidence and as a matter of law the 2.33 acres was voluntarily subdivided from adjoining lands in such a way that it could not be separately developed in compliance with the spacing rule in existence at the time, or any subsequent rule, "to prevent confiscation of property," the sole ground on which it was granted, there being no evidence that the west 52.33 acres of the Fuller tract from which it was subdivided in derogation of the rule needed more wells for such purpose, the application not having been presented or decided on that basis, and notice of hearing not having been given to all who would have been entitled to notice on that basis, and the undisputed evidence having shown that the west 52.33 acres was protected from drainage; and by reason thereof this court erred in failing to render judgment for appellants.

2.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits involved and enjoin the drilling and operation of the wells, because on the undisputed evidence and as a matter of law the judgment for appellants in Cause No. 54769 (consolidated with No. 54743) is **res adjudicata** of the permits

here involved; and by reason thereof this court erred in failing to render judgment for appellants.

3.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits and enjoin drilling and operation of the well locations involved, because on the undisputed evidence the pendency of Cause No. 53915 deprived the Railroad Commission of jurisdiction to grant said permits; and by reason thereof this court erred in failing to render judgment for appellants.

4.

The trial court erred in rendering judgment against appellants, refusing to cancel the permits and enjoin drilling and operation of the locations involved, because as a matter of law there was no substantial evidence of a necessity for four locations, or more than one, to be drilled on said 2.33 acres, considered separately, to prevent confiscation of property, and the undisputed evidence shows that one well will produce more than the oil under the 2.33 acres, and as a matter of law the permits for four wells were arbitrarily granted, without authority in the State law, and deprive appellants of equal protection of the law and deprive them of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and Section 17 of Article I of the Constitution of Texas; and by reason thereof this court erred in failing to render judgment for appellants.

5.

The trial court erred in rendering judgment against appellants refusing the alternative relief requested by them for an injunction against the production of oil from the wells in controversy until the Railroad Commission shall, after due notice and hearing, enter an order so adjusting the allowable production from the wells on the 2.33 acres that the total daily allowable from the wells thereon shall not bear a greater proportion to the total daily allowable fixed by the Commission for the wells on the remainder of the Fuller 100 acre tract than the oil reserves in place under the 2.33 acres bear to the oil reserves in place under the remainder of the Fuller 100 acre tract; and by reason thereof this court erred in failing to render judgment for appellants.

6.

The trial court erred in its finding of fact No. V to the effect that the conditions have so changed since the granting of the Hammonds permit for well No. 1 on the strip that the judgment in Cause No. 54769 is not **res adjudicata** of the permits in the case at bar; and this court erred in not so holding and in failing to render judgment for appellants.

7.

The trial court erred in concluding and holding that the challenged order of the Railroad Commission does not violate any of the rights of plaintiff or intervener under the Fourteenth Amendment to the Constitution

of the United States; and this court erred in not so holding and in failing to render judgment for appellants.

WHEREFORE, appellants pray that a rehearing be granted, and that upon such rehearing that part of the judgment which reverses the trial court's judgment be not disturbed, but that part of the judgment which remands the cause to the trial court be set aside, and that judgment be here rendered for appellants in accordance with the prayer in their brief.

Respectfully submitted,

GREENWOOD, MOODY & ROBERTSON
J. B. ROBERTSON
Austin, Texas
Attorneys for Magnolia
Petroleum Company.
T. L. FOSTER
MARTIN A. ROW
Dallas, Texas
POWELL, RAUHUT & GIDEON
J. A. RAUHUT
Austin, Texas
Attorneys for Sun Oil Company.

I, J. A. Rauhut, an attorney of record for appellant Sun Oil Company in this cause, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay or hindrance.

Witness my hand, this 30th day of July, 1942.

J. A. RAUHUT.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Petition for Rehearing is acknowledged, this the ..... day of July, 1942.

.....

Attorney for Appellees G. E. Burford and XYZ Oil & Gas Company

.....

Attorney for Appellees Railroad Commission of Texas and its Members

[fols. 473-480] APPELLANTS' REPLY TO MOTION OF REPUBLIC NATIONAL BANK OF DALLAS FOR LEAVE TO INTERVENE AND REPLY TO PETITION IN INTERVENTION IN THE NATURE OF A PETITION FOR REHEARING—Filed August 6, 1942

NO. 9962

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,
Appellants,

vs.

G. E. BURFORD, ET AL.,
Appellees.

APPELLANTS' REPLY TO MOTION OF REPUBLIC NATIONAL BANK OF DALLAS FOR LEAVE TO INTERVENE

TO THE HONORABLE COURT:

Appellants oppose the motion of Republic National Bank of Dallas for leave to intervene for the following reasons:

1.

The Bank alleges (paragraph III, p. 2) that on February 27, 1942, it made a loan to A. O. Phillips and took a lien on an oil payment owned by Phillips, in the land

involved. Such date was only twenty-five days after the entry by this court of an order overruling appellants' first petition for rehearing, and neither the time for filing a petition for writ of certiorari nor the present term of this court had expired. The Bank was charged with knowledge of those facts on the date it claims to have acquired its alleged interest, and in law is presumed to have known that on February 27, 1942, the judgment of this court dated December 29, 1941, was subject to review by the Supreme Court of the United States, and also continued to be within the jurisdiction of this court. The allegations of the motion for leave to intervene are insufficient on their face to establish the Bank's claim (paragraph VI, p. 4) that "in making said loan and in accepting said security therefor, petitioner (Bank) relied upon what it in good faith believed to be the final action of this court in overruling the appellants' first petition for rehearing."

2.

The motion does not show that the Bank is not fully secured in the payment of all sums due it by its lien on other property and by the personal liability of the makers of the note.

3.

Even if the Bank owns the interest it claims to have acquired pendente lite, it voluntarily took same subject to the outcome of this suit, and the Bank apparently was satisfied to rely upon appellees to present any

issues affecting the interest so acquired. The Bank does not claim that appellees have no remaining interest and does not seek to be substituted for any party. All necessary parties are before the court and no reason is apparent why the Bank should be permitted to intervene and multiply the costs of litigation. Comparison of the grounds for rehearing asserted by the Bank shows that it has merely adopted the grounds asserted by appellees. Thus, clearly such interest as the Bank has, if any, is adequately represented by appellees, just as the Bank apparently assumed it would be when it allegedly acquired an interest pendente lite.

4.

Even if the Bank showed any equity, which is denied, this could not operate to give appellees any greater right than they had before and, therefore, furnishes no basis for an order granting appellees a rehearing.

5.

Appellants have no knowledge of the interest which the Bank claims to have acquired pendente lite, and this court of appellate jurisdiction only is not the proper forum in which to determine the existence or effect of legal or equitable claims alleged by the Bank to have been acquired by it while this appeal was pending in this court.

WHEREFORE, appellants pray that said motion of Republic National Bank of Dallas for leave to file

petition in intervention in the nature of a petition for rehearing be overruled, and for their costs.

GREENWOOD, MOODY & ROBERTSON
J. B. ROBERTSON
Austin, Texas
Attorneys for Magnolia
Petroleum Company
T. L. FOSTER
MARTIN A. ROW
Dallas, Texas
POWELL, RAUHUT & GIDEON
J. A. RAUHUT
Austin, Texas
Attorneys for Sun Oil Company.

No. 9962

IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT

SUN OIL COMPANY, ET AL.,
Appellants,

vs.

G. E. BURFORD, ET AL.,
Appellees.

APPELLANTS' REPLY TO PETITION IN INTERVENTION IN THE NATURE OF A PETITION FOR REHEARING PRESENTED BY REPUBLIC NATIONAL BANK OF DALLAS

TO THE HONORABLE COURT:

Without waiving their objections to the motion of Republic National Bank of Dallas for leave to intervene, but subject to same, appellants reply to the

Bank's petition in intervention in the nature of a petition for rehearing, as follows:

1.

Appellants are without knowledge of the allegations contained in paragraph II thereof and demand strict proof.

2.

Appellants deny the allegation in paragraph IV(2) that this court abused its discretion in granting appellants' second petition for rehearing and deny that appellants had not shown the requisite diligence but treated the judgment of this court as final and permitted valuable property rights to be acquired by said Bank in reliance upon this court's first judgment.

3.

This court had jurisdiction to grant appellants' second petition for rehearing for the reasons stated therein and because of the reasons and authorities asserted in Appellants' Memorandum in Support of Appellants' Second Petition for Rehearing and Reply to Appellees' Opposition Thereto. Appellants promptly and diligently filed their second petition for rehearing after the decision of this court in its Cause No. 9729 styled Selby Oil & Gas Company, et al. vs. Railroad Commission, et al., filed May 13, 1942, and within the

same term of court as the original decision in this cause.

4.

As a matter of law, on the undisputed facts in the record, the trial court erroneously decided the issues of State law involved in this case, for all the reasons fully shown in Brief for Appellants and Supplemental Brief for Appellants. Therefore, its judgment should not be affirmed and was properly reversed by this court.

WHEREFORE, appellants pray that said petition in intervention in the nature of a petition for rehearing be denied.

GREENWOOD, MOODY & ROBERTSON
J. B. ROBERTSON
Austin, Texas
Attorneys for Magnolia
Petroleum Company

T. L. FOSTER
MARTIN A. ROW
Dallas, Texas

POWELL, RAUHUT & GIDEON
J. A. RAUHUT
Austin, Texas
Attorneys for Sun Oil Company.

ACKNOWLEDGMENT OF SERVICE

Service of Appellants' Reply to Motion of Republic National Bank of Dallas for Leave to Intervene, and Reply to its Petition in Intervention in the Nature of a Petition for Rehearing is acknowledged this ..... day of August, 1942.

.....

Dallas, Texas
Attorney for Republic National
Bank of Dallas

.....

Attorney for Appellees G. E. Burford
and X Y Z Oil & Gas Company

.....

Attorney for Appellees Railroad
Commission of Texas and
its Members

[fol. 481] OPINION OF THE COURT ON MOTION OF REPUBLIC NATIONAL BANK OF DALLAS FOR LEAVE TO FILE PETITION IN INTERVENTION, ETC., AND DISSENTING OPINION OF JUDGE McCORD—Filed August 12, 1942

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9962

SUN OIL COMPANY, et al., Appellants,

versus

G. E. BURFORD, et al., Appellees

Appeal from the District Court of the United States for the Western District of Texas

On Motion of Republic National Bank of Dallas for Leave to File Petition in Intervention in the Nature of a Petition for Rehearing

August 12, 1942

Before Holmes and McCord, Circuit Judges, and Dawkins, District Judge

HOLMES, Circuit Judge:

Less than a month after the first petition for rehearing in this case was denied, and the mandate sent down, the Republic National Bank of Dallas made a loan to A. O. Phillips secured by a deed of trust on some of the oil in place, the production from which is here in controversy. The bank now asks leave to intervene in this suit so that it may file a petition in the nature of a petition for rehear-[fol. 482] ing, and obtain such relief as may be just. While it is incongruous to seek a rehearing on behalf of one who was not a party to any prior hearing, we have considered the bank's motion on its merits.

At the time the bank made its loan neither the term of court nor the time allowed to grant certiorari had expired, and it had no right to rely on the finality of our decision; but, if it did, it has not been prejudiced by the setting aside of our first, and the entry of our second, judgment. The

affirmance merely upheld the judgment of the district court, wherein its jurisdiction had been sustained, the prayer for an injunction denied, and the plaintiffs relegated to the state courts upon all issues other than those under the federal constitution.

On appellants' second petition for rehearing, during the same term, we set aside the judgment of affirmance and remanded the entire cause to the district court for a new trial, merely restating at greater length the law of the case. We withdrew no part of our former opinion except that part which relegated state issues to the state courts, and even that prior ruling was qualified, as follows: "Unless and until the court of last resort of the state has decided that an 'independent judgment' as to reasonableness should be exercised by the [state] courts."[1]

The supervening decision of the Supreme Court of Texas, holding that the state courts might exercise such independent judgment, made it necessary for us to hold in our second opinion that the federal courts might decide such issues arising under the laws of the state. This was for the reason that prior to that time we deemed the particular point unsettled by Texas decisions, and were in doubt as to the state law on the subject.[2]

[fol. 483] When the bank made its loan, if it was relying on our judgment of affirmance, it was presumed to know that the judgment of the district court in this case left the plaintiffs free to pursue in the state courts whatever rights the state statutes afforded them.[3]

Without waiving their objections to the motion of the bank for leave to intervene, the appellants have filed a reply thereto, traversing some, and claiming to be without knowledge of, other parts thereof. We agree with appellants that, even if the bank owns the interest it claims to have acquired, it voluntarily took the same subject to the outcome of this suit, and was apparently satisfied to rely upon appellees to present any issues affecting the interest so acquired. The bank does not claim that appellees have no

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[1] 124 F. (2) 470, 471.

[2] Railroad Commission of Texas, et al. v. Rowan & Nichols, 310 U. S. 573, 311 U. S. 570, 615; Railroad Commission of Texas, et al. v. Pullman Company, et al., 312 U. S. 496.

[3] Transcript of Record, p. 92.

remaining interest, and does not seek to be substituted in place of any party. Comparison of the grounds for rehearing asserted by the bank shows that it has merely adopted the grounds asserted by the appellees.

No one may acquire a vested interest in a decision until the time has elapsed in which the court has jurisdiction to change it. To uphold appellees' contention would deprive this court of part of its jurisdiction, since, in granting the second petition for rehearing during the same term of court, we held that such jurisdiction existed to prevent an injustice.[4]

The effect of our first decision was to decide the federal constitutional question and relegate issues arising under state law to the state courts; our present decision remands those issues to the court below; and, since the case had to go back to the district court for retrial, we thought it best to let the trial be anew in its entirety. When the [fol. 484] bank made its loan it did so with the knowledge that the state court might decide adversely to those interests to which it was advancing credit. The effect of granting the rehearing and remanding the case was to leave open upon their merits all issues presented by the pleadings. No one may acquire a property right to have a cause tried in the state court rather than in the federal court.

The motion of the bank for leave to file its petition is overruled.

McCord, Circuit Judge, Dissenting:

I concurred in the opinions elaborating upon the principles of law to be applied in Federal Courts in cases involving orders and regulations of the Texas Railroad Commission. *Sun Oil Co. v. Burford*, 124 F. 2d 467, and opinion on Appellants' Second Petition for Rehearing, July 11, 1942, — F. 2d —. However, in my special concurrence to the opinion of July 11, 1942, I expressed doubt that the court

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[4] See our rule 32, which implies that a mandate once issued may, during the term, be recalled to prevent injustice; also our rule 29, which implies that, after twenty-one days from date of judgment, a petition for rehearing may, during the term, be presented by special leave of court or of one of the judges.

had the right to reopen the case and grant a new trial "after the lapse of such a great length of time, after the time allowed for filing petition for certiorari has expired." I reiterate the doubt there expressed. I am of opinion that Appellants' Second Petition for Rehearing came too late and should not have been granted.

I respectfully dissent.

[fol. 485] ORDER ON MOTION OF REPUBLIC NATIONAL BANK FOR LEAVE TO INTERVENE

Extract from the Minutes of August 12th, 1942

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

It is ordered by the Court that the motion of Republic National Bank of Dallas for leave to file petition in intervention in the nature of a petition for rehearing filed in this cause be, and the same is hereby, denied.

"McCord, Circuit Judge, dissents."

[fol. 486] ORDER DENYING APPELLEES' PETITION FOR REHEARING

Extract from the Minutes of August 13th, 1942

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

It is ordered by the Court that Appellees' petition for rehearing, filed in this cause be, and the same is hereby, denied.

[fol. 487] ORDER DENYING APPELLANTS' THIRD PETITION FOR REHEARING

Extract from the Minutes of August 13th, 1942

No. 9962

SUN OIL COMPANY, et al.,

versus

G. E. BURFORD, et al.

It is ordered by the Court that Appellants' Third Petition for Rehearing filed in this cause be, and the same is hereby, denied.

[fol. 488] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 489] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 495

ORDER ALLOWING CERTIORARI—Filed December 14, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 490] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 496

ORDER ALLOWING CERTIORARI—Filed January 18, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.